TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1911

No. [redacted] 36

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF OREGON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED APRIL 21, 1909.

(21,618.)

(21,618.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 822.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 11, 1909.

1 In the Supreme Court of the United States.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY,
a Corporation, Plaintiff in Error,
vs.
STATE OF OREGON, Defendant in Error.

Appeal from the Supreme Court of Oregon.

Opinion by Justice Bean.

Filed Feb. 2, 1909.

E. S. Pillsbury, Carey & Kerr and Harrison Allen, Attorneys for Plaintiff in Error.
A. M. Crawford, Attorney General, for Defendant in Error.

2-4 In the Supreme Court of the State of Oregon, March Term, 1908.

STATE OF OREGON, Plaintiff-Respondent,
vs.
PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Defendant-Appellant.

Appellant's Abstract of Record.

Appeal from the Judgment of the Circuit Court for Multnomah County—Hon. John B. Cleland, Judge.

E. S. Pillsbury, Carey & Kerr, Harrison Allen, Attorneys for Appellant.
Hon. A. M. Crawford, Attorney General; Hon. John Manning, District Attorney, Attorneys for Respondent.

5 In the Supreme Court of the State of Oregon, March Term, 1908.

STATE OF OREGON, Plaintiff-Respondent,
vs.
PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Defendant-Appellant.

APPELLANT'S ABSTRACT OF RECORD.

On the 16th day of May, 1907, the plaintiff filed in the circuit court for the county of Multnomah a

Complaint,

stating its cause of action as follows:

(Title.)

6 Comes now the plaintiff by A. M. Crawford, its attorney general, and John Manning, district attorney for the Fourth judicial district, and for cause of action alleges:

I.

That at all the times and dates hereinafter alleged the defendant was and still is a corporation, duly created, organized and existing under and by virtue of the laws of the state of Oregon, and having its principal office and place of business in the city of Portland, Multnomah county, Oregon.

II.

That on or about the 2nd day of April, A. D. 1907, the said defendant, in accordance with the request of the state treasurer of the state of Oregon therefor and in pursuance of the requirements of an initiative law requiring express, telephone, and telegraph companies to pay a license upon their gross receipts, passed by a vote of the people June 4, 1906, and promulgated by proclamation of the governor, dated June 25, 1906, and published as chapter 1 of the laws of 1907, duly made and filed with said state treasurer its annual statement showing its gross receipts and business transacted within the state of Oregon for the period beginning June 26, 1906, and ending December 31, 1906, to be $475,031.

III.

7 That the license due the state of Oregon from defendant under and by virtue of said act is two per centum upon the said sum of $475,031, to-wit: $9,500.62; that no part thereof has been paid, although more than thirty days has elapsed since said statement was required by the state treasurer of the state of Oregon of and by the defendant filed in said state treasurer's office.

IV.

That under and by virtue of the said act above mentioned, the additional sum of ten per centum of said license is due the plaintiff from defendant, to-wit: the sum of $950.06, for such failure to make payment of said license within the period of thirty days from and after the date said statement was required of the defendant as aforesaid, or from and after the date the same was filed with the treasurer of the state of Oregon, as before alleged, and there is now due and owing to the plaintiff from the defendant the sum of $9,500.62, license, and the sum of $950.06 for failure to pay the same within thirty days after the same became due and payable, to-wit: a total of $10,450.68.

Wherefore, plaintiff demands judgment against the defendant for the sum of $10,450.68, besides costs and disbursements in this action.

A. M. CRAWFORD,
Attorney General.
JOHN MANNING,
District Attorney, Fourth Judicial District,
Attorneys for Plaintiff.
By H. B. ADAMS, *Deputy.*

8 On the 14th day of September, 1907, the defendant filed its

Answer,

as follows:

(Title.)

Now comes the defendant, Pacific States Telephone and Telegraph Company, a corporation, and answering the complaint of the plaintiff herein, denies each and every allegation therein contained except that the defendant admits that it is a corporation as alleged in the complaint, and that it furnished the report referred to in the complaint, and that the volume of its business within the state of Oregon from June 25, 1905, to January 1, 1907, was as stated in the complaint and that two per cent. thereof is the amount demanded by plaintiff of defendant together with ten per cent. of said amount for failure to pay the same as alleged in the complaint, and that defendant has not paid said amount or any part thereof or said additional sum of ten per cent. of said amount, or any part thereof.

And further answering the complaint defendant avers:

I.

That this defendant was duly incorporated under the laws of the state of Oregon on the 8th day of May, 1900, and has ever since said 8th day of May, 1900, been, and still is, a corporation duly
9 organized and existing under and by virtue of said laws, and has ever since said 8th day of May, 1900, had and still has its residence and principal place of business in said state.

II.

That the state of Oregon was admitted into the union of the United States of America on the 14th day of February, 1859, by an act of congress entitled: "An act for the admission of Oregon into the union," approved February 14, 1859; that at the time of the said admission into the union of said state of Oregon, and thereafter and until the 2nd day of June, 1902, the legislative authority of the state of Oregon was vested in a legislature consisting of a senate and house of representatives under and by virtue of section 1 of article IV of the constitution of the state of Oregon, which provided as follows, and not otherwise, to-wit: "The legislative authority of the

state shall be vested in a legislative assembly consisting of a senat and house of representatives. The style of every bill shall be "B it enacted by the legislative assembly of the state of Oregon," and n law shall be enacted except by bill."

III.

That on the first Monday in June, 1902, the people of Orego undertook and endeavored to amend the constitution of the state o Oregon by adopting by popular vote the following as an amendmen thereto:

"Section 1 of article IV of the constitution of the state o
10 Oregon shall be and hereby is amended to read as follows:

"SECTION 1. The legislative authority of the state shall b vested in a legislative assembly, consisting of a senate and house o representatives, but the people reserve to themselves power to propos laws and amendments to the constitution and to enact or reject th same at the polls, independent of the legislative assembly, and al reserve power at their own option to approve or reject at the poll any act of legislative assembly. The first power reserved by th people is the initiative, and not more than eight per cent. of the legi voters shall be required to propose any measure by such petition and every such petition shall include the full text of the measur so proposed. Initiative petitions shall be filed with the secretary o state not less than four months before the election at which they ar to be voted upon. The second power is the referendum, and it ma be ordered (except as to laws necessary for the immediate preserva tion of the public peace, health, or safety) either by the petitio signed by five per cent. of the legal voters, or by the legislative a sembly, as other bills are enacted. Referendum petitions shall b filed with the secretary of state not more than ninety days after th final adjournment of the session of the legislative assembly whic passed the bill on which the referendum is demanded. Th
11 veto power of the governor shall not extend to measure referred to the people. All elections on measures referre to the people of the state shall be had at the biennial regular genera elections, except when the legislative assembly shall order a specia election. Any measure referred to the people shall take effect an become the law when it is approved by a majority of the votes cas thereon, and not otherwise. The style of all bills shall be: "Be i enacted by the people of the state of Oregon." This section shal not be construed to deprive any member of the legislative assembl of the right to introduce any measure. The whole number of vote cast for justice of the supreme court at the regular election last pre ceding the filing of any petition for the initiative or for the referen dum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for th initiative and for the referendum shall be filed with the secretary of state, and in submitting the same to the people he, and all othe officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provide therefor."

Said pretended amendment of section 1 of article IV of said constitution is hereinafter referred to as "said pretended amendment."

12 IV.

That pursuant to said pretended amendment the legislative assembly of the state of Oregon passed a pretended act entitled: "An act making effective the initiative and referendum and referendum provisions of section 1 of article IV of the constitution of the state of Oregon, and regulating elections thereunder and providing penalties for violations of provisions of this act," approved February 24, 1903, a copy whereof is hereunto annexed and marked Exhibit "A" and is hereby referred to and especially made a part hereof, and is hereinafter referred to as "said pretended act Exhibit 'A.'"

That pursuant to said pretended amendment and pursuant to said pretended act, Exhibit "A," and on the 3rd day of February, 1906, more than eight per cent. of the number of legal voters of the state of Oregon, casting votes for justice of the supreme court at the regular election next preceding said 3rd day of February, 1906, proposed a measure by petition by filing petitions with the secretary of state of the state of Oregon on said 3rd day of February, 1906, requiring express, telephone and telegraph companies engaged in business within the state of Oregon to pay a license tax upon their gross receipts; that thereupon said secretary of state, pursuant to said pretended act Exhibit "A," adjudged that said petitions were regular in form and that they were signed by the requisite number of

13 electors, and thereupon he granted the prayer of said petitions and submitted said measure to the vote of the people of the state of Oregon at a biennial regular general election held in said state on the 4th day of June, 1906, and placed the same upon the official ballot, as appears more fully from a copy of an official ballot voted at said election in Precinct No. 15 of Multnomah county in said state, hereto annexed and marked Exhibit "B," and hereby especially referred to and made a part hereof; that said Exhibit "B," is a true copy of the ballots used and voted at said election in all the voting precincts of said state, except as to local officers; and as to said measure, it is a true copy of all said ballots; that thereafter, and on said 4th day of June, 1906, said measure was approved by a majority of the votes cast thereon, and a majority of the voters voting at said election voted for the passage of said measure; that thereafter and on the 25th day of June, 1906, and pursuant to said pretended act Exhibit "A," said measure was promulgated by a proclamation of the governor of said state and published as chapter 1 of the laws of 1907 of the state of Oregon; that said measure approved as aforesaid on said 4th day of June, 1906, is in words and figures as follows, to-wit:

"Be it enacted by the people of the state of Oregon:

"SECTION 1. That every express company or corporation doing business in this state shall pay to the state of Oregon a

14 license of three (3) per centum upon the gross receipts of such company or corporation received in this state, and every telephone company or corporation doing business in this state and

every telegraph company or corporation doing business in this state shall pay to the state of Oregon a license of two (2) per centum upon the gross receipts of such company or corporation received in this State; which license shall be paid annually by such company or corporation to the treasurer of this state. And for the purpose of ascertaining the amount of the same, it shall be the duty of the president secretary and treasurer, or such of them as reside in this state, or if neither of said officers reside in this state, then of the general manager or other officer or agent of such company or corporation having general control, management or supervision of its business within this state, to transmit to the state treasurer, on or before the first day of March of each year, a statement, under oath, of the gross receipts of said company or corporation for business transacted within this state during the preceding year, ending December 31st of said year, and if such company or corporation shall fail to make such statement, or to pay any such license, for the period of thirty (30) days from and after such statement is required by this act to be made, or after such license is due and payable, as herein provided, the amount thereof, with the addition of ten (10) per centum thereon for such failure, shall be collected of such company or corporation, for the use of the state, and the same is hereby declared to be and is made a debt due and owing from such company or corporation to the state of Oregon, and the attorney general of the state, or district attorney of the proper judicial district, shall commence and prosecute to final determination in any court of competent jurisdiction, an action at law to collect the same, and to that end and to make this act more effective the said attorney general, or district attorney, as the case may be, or both, shall have the same power and authority to call before him or them, officers or agents of such delinquent company or corporation, and other witnesses, for examination bearing upon the earnings of such company or corporation, the same as may now be done by district attorneys of the state of Oregon in criminal matters; and it is hereby made the duty of the state treasurer to give notice to the attorney general of such failure to file such statement or to pay such license within ten days from and after the expiration of the said thirty days herein above mentioned.

"SECTION 2. If any officer or agent of any company or corporation mentioned in section 1 of this act shall fail, neglect, or refuse to make and file such annual statement of the gross receipts of the company or corporation of which he is such officer or agent, for thirty (30) days after the first day of March in each year, he shall be deemed to be guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine of not less than five hundred ($500) nor more than one thousand ($1,000) dollars, or by imprisonment in the county jail not less than thirty (30) days nor more than six (6) months, or by both such fine and imprisonment in the discretion of the court; and the district attorney of the proper judicial district shall commence and prosecute to final determination in any court of competent jurisdiction an action at law to enforce this penalty.

"SECTION 3. That any person or persons, joint stock company

or corporation, wherever organized or incorporated when engaged in the business of conveying to, from, or through this state, or any part thereof, money, packages, gold, silverplate, merchandise, or other articles, by express, not including the ordinary manner of transportation customarily designated as freight, shall be deemed to be an express company. That any person or persons, joint stock company, or corporation, wherever organized or incorporated, when engaged in the business — transmitting to, from, through, or
17 in this state, telephone messages, shall be deemed to be a telephone company. That any person or persons, joint stock company, or corporation, wherever organized or incorporated, when engaged in the business of transmitting to, from, through or in this state, telegraph messages, shall be deemed to be a telegraph company.

"SECTION 4. In addition to the statement of gross receipts required by the provisions of section 1 of this act such statement shall also contain the following facts:

"First. The name of the company.

"Second. The nature of the company, whether a person or persons, company or corporation and under the laws of what state or country it was organized.

"Third. The location of the principal office of such business or company.

"Fourth. The name, post-office address, and place of residence of the president, secretary, treasurer, superintendent, and general manager.

"Fifth. The name, post-office address, and place of residence of the chief officer or managing agent of the company or business in this state."

Said measure is hereinafter referred to as "said pretended initiative measure."

That said pretended initiative measure is the measure re-
18 ferred to in paragraphs 3 and 4 of the complaint herein, and is the measure pursuant to the provisions whereof said sum of ninety-five hundred dollars and sixty-two cents ($9,500.62) is alleged to be due from this defendant to plaintiff and pursuant to the provisions whereof said sum of nine hundred and fifty dollars and six cents ($950.06) is alleged to be due from this defendant to plaintiff for failure to pay said sum of ninety-five hundred dollars and sixty-two cents ($9,500.62).

IV.

That at the time said pretended initiative measure was voted on as aforesaid, and at the time the same was promulgated by the governor of the state of Oregon as aforesaid, the legislative assembly of the state of Oregon was not in session; that there was no session of the legislative assembly of the state of Oregon held between the month of February, 1905, and the month of January, 1907; that said pretended initiative measure was not considered or enacted or published as a law or otherwise by the legislative assembly of the state of Oregon; that said pretended initiative measure was not considered by or submitted to the deliberations of, or read before its pretended

enactment by, and was not enacted by, any legislative or other representatives of the people, or of any part of the people, of the state of Oregon, or any legislative assembly or assemblies or representatives of the people, or of any part of the people, of the state of
19 Oregon, and said pretended initiative measure, before its pretended enactment, was not submitted to, or considered by and was not approved by, the governor of the state of Oregon, or any executive, or administrative, or other officer, or official of the government of the state of Oregon, or any representative of the people, or of any part of the people, of the state of Oregon; that said pretended initiative measure was never introduced before or referred to or considered by or passed upon by, or in any way acted upon by any representatives of the people, or of any part of the people, of the state of Oregon, or by any officer or branch or department of the government of said state, but said pretended initiative measure was enacted, so far as it has been enacted at all, wholly and solely by the direct vote of a majority of the voters of the state of Oregon voting at said election, and in the manner before stated, and not otherwise.

VII.

That said pretended initiative measure was proposed and voted on and promulgated as hereinbefore set forth, solely pursuant to the provisions and under the sole authority of said pretended amendment, and of said pretended act Exhibit "A," and not otherwise.

VIII.

That said pretended initiative measure is null and void
20 and of no effect because said pretended amendment and said pretended act Exhibit "A," if enforced, will render nugatory and will destroy the representative legislative assembly and the legislative power of the representative legislative assembly of the state of Oregon contrary to and in violation of the provisions contained in article 1, section 2, and in article 1, section 3, and in article 1, section 4, and in article 1, section 8, and in article 4, section 3, and in article 4, section 4, and in article 5, and in article 6, of the constitution of the United States, and in article XIV of the amendments to the constitution of the United States, that the several states of the Union shall create and maintain representative legislative assemblies; and because said pretended amendment and said pretended act Exhibit "A," are and each of them, is contrary to and in violation of the implied provision of the constitution of the United States that the government of the several states shall be representative in form and that the several states shall create and maintain representative legislative assemblies.

IX.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A," purport, and each of them purports, to create and provide for a legislature, to-wit: a part of the voters of the state of

Oregon not elected by the people of the state of Oregon and
21 purport, and each of them purports, to abrogate the existence of electors for the most numerous branch of the legislature of this state, to-wit: a part of the voters of said State, thereby making impossible the determination of the qualifications necessary in the state of Oregon for electors of the members from said state of the house of representatives of the United States, contrary to and in violation of the provisions of section 2, article 1, of the constitution of the United States that the house of representatives shall be composed of members chosen every second year by the people of the several states, and that the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

X.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A," empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive, and purport, and each of them purports, to deprive the representative legislative assembly of the state of Oregon of the power to consent to the purchase by the congress of the United States of places in the state of Oregon for the erection of forts, magazines, arsenals, dockyards, and other needful buildings contrary to and in violation of the provisions of section 8, article 1, of the constitution of the United States.

22 XI.

That said initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive and purport, and each of them purports, to deprive the representative legislative assembly of the state of Oregon of the power to prescribe the times, place and manner of the holding elections for senators and representatives in the congress of the United States, contrary to and in violation of the provisions of section 4, article 1, of the constitution of the United States.

XII.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive and purport and each of them purports to deprive the representative legislative assembly of the state of Oregon of the power to direct the manner in which the state of Oregon shall appoint electors for the election of the president and vice president of the United States of America, contrary to and in violation of the provisions of section 1, article II of the constitution of the United States.

23

XIII.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive and purport, and each of them purports, to deprive the representative legislative assembly of the state of Oregon of the power or consent to the junction of the state of Oregon, with one or more states or parts of states of the union, contrary to and in violation of the provisions of section 3, article IV, of the constitution of the United States.

XIV.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive, and purport, and each of them purports, to deprive the representative legislative assembly of the state of Oregon of the power to apply to the United States for protection against domestic violence within the state of Oregon, contrary to and in violation of the provisions of section 4, article IV, of the constitution of the United States.

XV.

That said pretended initiative measure is null and void
24 and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive, and purport, and each of them purports, to deprive the representative legislative assembly of the state of Oregon of the power to apply to the congress of the United States for a convention for proposing amendments to the constitution of the United States, and of the power to ratify amendments proposed to the constitution of the United States, contrary to and in violation of the provisions of article V, of the constitution of the United States.

XVI.

That said pretended initiative measure is null and void and of no effect because said pretended amendments and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive and purport, and each of them purports, to deprive the representative legislative assembly of the state of Oregon of the power to choose the senators from said state for the senate of the United States contrary to and in violation of the provisions of section 3, of article I, of the constitution of the United States.

XVII.

That said pretended initiative measure and said pretended
25 amendment and said pretended act Exhibit "A" are, and each of them is, contrary to and in violation of the rights,

privileges and immunities of the defendant under and pursuant to the provisions of section 4, article IV, of the constitution of the United States, and are, and each of them is, contrary to and in violation of the provisions of section 4, of article IV, of the constitution of the United States, and are, and each of them is, unrepublican and contrary to and inconsistent with and violative of a republican form of government, and therefore are, and each of them is, null and void and of no effect.

XVIII.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" purport, and each of them purports, to provide for and pretend, and each of them pretends, to create a legislative body or legislature in the state of Oregon, to-wit: a part of the voters of said state prepared and empowered at all times and continuously to enact legislation contrary to and in violation of the provisions of section 3, article I, and of section 4, of article IV of the constitution of the United States that the legislatures of the several states of the union shall at times take a recess and shall from time to time meet and convene and be convened and adjourn, and contrary to and in violation of the provisions, and in derogation of the powers
26 conferred upon the executive of the state of Oregon by the provisions of said section 3 of said article I, that the executive of a state may make temporary appointments to the senate of the United States during a recess of the legislature of said state, and of said section 4, of said article IV, that the executive of a state may apply to the United States for protection against domestic violence when the legislature cannot be convened.

XIX.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" will, and each of them will, if enforced, create a legislature consisting wholly or in part of the voters of said state, acting as the legislature, or as a part of the legislature of said state, without their election as legislators and solely by reason of, and in their capacity as voters, and said pretended amendment and said pretended act Exhibit "A" purport and undertake and each of them purports and undertakes, to confer upon a part of the voters of the state of Oregon, as such, a part or all of the power to choose the senators from said state for the senate of the United States, and to consent to the purchase by the congress of the United States of places in the state of Oregon for the erection of forts, magazines, arsenals, dockyards and other needful buildings, and to prescribe the times,
27 places and manner of holding elections for senators and representatives in the congress of the United States, and to direct the manner in which the state of Oregon shall appoint electors for the election of the president and vice-president of the United States, and to consent to the junction of the state of Oregon with one or more states or parts of states of the union, and to apply to the United

States for protection against domestic violence within the state of Oregon, and to apply to the congress of the United States for a convention for proposing amendments to the constitution of the United States, and to ratify amendments proposed to the constitution of the United States contrary to and in violation of the provisions respectively of section 3 of article I, and of section 4 of article I, and of section 8 of article 1, and of section 1, of article II, and of section 3 of article IV, and of section 4 of article IV and of Article V of the constitution of the United States hereinbefore referred to, that said powers shall be exercised by the legislatures, to-wit: Representative legislative assembly of the several states, as hereinbefore set forth.

XX.

That said pretended initiative measure was not passed or enacted or adopted or promulgated in accordance with due process of law as prescribed by section 1, of article XIV, of the amendments of the constitution of the United States, and that the pretended
28 license or tax upon this defendant, or upon its gross receipts, purporting to be levied upon or assessed against defendant, or its gross receipts, by said pretended initiative measure is not levied or asses-ed by due process of law, and if defendant be compelled to pay said pretended license or tax, defendant will be deprived of its property without due process of law, contrary to and in violation of the rights, privileges and immunities of defendant under said section 1 of article XIV of the amendments to the constitution of the United States, and said pretended initiative measure denies to defendant the equal protection of the laws contrary to and in violation of the rights, privileges and immunities of defendant under said section 1 of article XIV of the amendments of the constitution of the United States.

XXI.

That at the time the state of Oregon was admitted into the union by said act of congress, approved February 14, 1859, as aforesaid, the state government and constitution of the state of Oregon were republican in form and in conformity with the constitution of the United States, and said state of Oregon was so admitted to the union upon the condition contained in said act of congress that the state government and constitution of the state of Oregon should be republican in form and in conformity with the constitution of the United States; that, as hereinbefore set forth, said pretended amendment
29 and said pretended act Exhibit "A" are, and each of them is, unrepublican in form and not in conformity with, but is contrary to, and in violation of, a republican form of government, and of the constitution of the United States, and contrary to and in violation of the said act of congress, and the condition of said act, approved February 14th, 1859, and contrary to and in violation of the rights, privileges and immunities under said act of congress of this defendant, a resident of said state of Oregon, and duly incorporated under and by virtue of the laws of the said state; and said pretended initiative measure, proposed and voted upon and promulgated pursuant to the provisions of said pretended amendment

and of said pretended act Exhibit "A" as aforesaid, is therefore null and void and of no effect.

XXII.

That said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon by direct vote to deprive and purport and each of them purports, to deprive the legislative assembly of the state of Oregon of the powers conferred upon the legislative assembly of the state of Oregon by the propositions made by the congress of the United States to the people of the state of Oregon, by section 4 of the act entitled: "An act for the admission of Oregon into the union," approved February 14th, 1859, regarding the use and disposition of the public lands and the salt springs and of the net proceeds of sales of public lands and by the acceptance of said propositions by means of the act of the legislative assembly of the state of Oregon entitled: "An act relative to certain propositions made by the congress of the United States to the people of the state of Oregon," in effect September 2nd, 1859; and said pretended amendment and said pretended act Exhibit "A" purport and undertake, and each of them purports and undertakes, to confer upon a part of the voters of the state of Oregon as such, a part or all of said powers; that said pretended amendment and said pretended act Exhibit "A" do, and each of them does, impair the obligation of the contract between the state of Oregon and the United States of America as contained in said act of congress, approved February 14th, 1859, and in the acceptance of the propositions therein made by the congress of the United States to the people of the state of Oregon and accepted by the people of the state of Oregon, by said act of the legislative assembly of the state of Oregon, in effect September 2, 1859, to-wit: the contractual obligation of the state of Oregon to maintain a government republican in form and in conformity with the constitution of the United States, and to preserve to the legislative assembly of the state of Oregon the power to use and dispose of the public lands and the salt springs and the net proceeds of sales of public lands in the state of Oregon, contrary to and in violation of section 10 of article I of the constitution of the United States that no state shall pass a law impairing the obligation of a contract, and said pretended initiative measure is therefore null and void and of no effect.

XXIII.

That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" purport, and each of them purports, to create within the state of Oregon a legislature, or a part of a legislature, to-wit: a part of the voters of the state of Oregon empowered to legislate, without taking the oath or affirmation required by article VI of the constitution of the United States, and without taking the oath of office required by the act of congress approved June 1, 1789, section 1836 of the revised statutes of the United States, 1 Statutes at Large,

23 contrary to and in violation of said article VI of the constitution of the United States and of the provisions of said act approved June 1, 1789.

That said pretended initiative measure is null and void and of no effect because none of the voters of the state of Oregon voting on passage of said pretended initiative measure and in favor thereof, as hereinbefore set forth, did prior to so voting, take the oath or affirmation required by article VI of the constitution of the United States, or by the said act of congress approved June 1, 1789,

32 contrary to and in violation of said article VI of the constitution of the United States and contrary to and in violation of the provisions of said act.

XXIV.

That by its articles of incorporation the defendant at all the times herein mentioned was and still is authorized to construct, maintain and operate lines of telegraph in and between the various states of the union and including the state of Oregon; that on the 18th day of October, 1900, defendant duly filed its written acceptance with the postmaster general of the United States of the restrictions and obligations of an act of congress entitled: "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," approved July 24th, 1866; that in accordance with the authority of its said articles of incorporation and the said act of congress, the said defendant has ever since said 18th day of October, 1900, constructed, maintained and operated and still constructs, maintains and operates, lines of telegraph through and over portions of the public domain of the United States within the state of Oregon and elsewhere within the United States and over and along the post-roads of the United States within the state of Oregon and from the state of Oregon beyond the limits thereof to various states of the United States; that pursuant to said

act of congress approved July 24, 1866, defendant has since

33 the 18th day of October, 1900, been, and now is, engaged in sending and prepared and ready and willing to send telegraphic communications between the several departments of the government of the United States and their officers and agents, giving and prepared and ready and willing to give priority to said official telegraphic communications over all other business; and defendant avers that said official telegrams have, ever since said date, been and are sent, and defendant has, ever since said date, been and is now prepared and ready and willing to send said official telegrams at the rates fixed annually, ever since the said 18th day of October, 1900, by the postmaster general.

XXV.

That said pretended initiative measure is null and void and of no effect because it purports and undertakes to tax the business done by this defendant as a telegraph company with the officials of the government of the United States under and pursuant to the provisions of said act of congress approved July 24, 1866, and because said pre-

tended initiative measure purports and undertakes to tax the business of this defendant as an agency of the United States contrary to and in violation of the constitution of the United States and of section 8 of article 1 thereof that the congress shall have power to establish and maintain post offices and post roads.

34 XXVI.

That prior to the pretended enactment of said pretended initiative measure, to-wit: Prior to the 4th day of June, 1905, various telegraph companies other than this defendant and duly incorporated and organized under the laws of various states of the United States, and by their charters and articles of incorporation duly authorized to construct, maintain and operate lines of telegraph in and between various states of the union, including the state of Oregon, did at various dates prior to said 4th day of June, 1905, file their written acceptance with the postmaster general of the United States of the restrictions and obligations of an act of congress entitled: "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," approved July 24, 1866; that in accordance with the authority of their respective charters and articles of incorporation and pursuant to said act of congress, approved July 24, 1866, said telegraph companies did, prior to the 4th day of June, 1905, and thereafter continue to and still do construct, maintain and operate lines of telegraph through and over portions of the public domain of the United States within the state of Oregon and elsewhere within the United States, and over and along post roads of the United States within the state of Oregon and from the state of Oregon beyond the limits
35 thereof to the various states of the United States, and pursuant to said act of congress approved July 24, 1866, were prior to said 4th day of June, 1906, and have ever since been and still are engaged in sending telegraphic communications between the several departments of the government of the United States and their officers and agents, giving priority to said official telegraphic communications over all other business and sending said official telegrams at rates annually fixed by the postmaster general of the United States, in the manner done by and required of this defendant as hereinbefore set forth.

XXVII.

That said pretended initiative measure is null and void and of no effect because it purports and undertakes to tax the business of said telegraph companies done with the officials of the government of the United States under and pursuant to the provisions of said act of congress approved July 24, 1866; and because said pretended initiative measure purports and undertakes to tax the business of said telegraph companies as agents of the United States contrary to and in violation of the constitution of the United States and of section 8 of article I thereof, that the congress shall have power to establish and maintain post offices and post roads.

XXVIII.

That the authorized capital stock of this defendant exceeds
36 $2,000,000; that under and by virtue of the provisions of an act of the people of the state of Oregon and of the legislative assembly of the state of Oregon, entitled: "An act to provide for the licensing of domestic corporations and foreign corporations, joint stock companies and associations," etc., approved February 16, 1903, requiring corporations doing business in the state of Oregon to pay an annual license fee proportionate to their authorized capital stock, this defendant, prior to said pretended enactment of said pretended initiative measure purporting and undertaking to levy said tax upon the gross receipts of this defendant, did pay and ever since has paid at the times and in the manner provided by law an annual license fee of $200; that in the manner and at the times provided by law defendant, pursuant to the laws of the state of Oregon, did prior to said pretended enactment of said pretended initiative measure pay, and has ever since paid, state, county and school taxes levied in said state upon all of its property within the state of Oregon, including its franchise to do the business in said state which said pretended initiative measure purports and undertakes to tax and which said taxes upon its said property, including its said franchise, have been and still are from time to time levied and assessed against this defendant by the county of Multnomah, in said state.

That said pretended initiative measure purporting and
37 undertaking to levy said tax upon the gross receipts of this defendant is contrary to and in violation of section 32 of article I of the constitution of the state of Oregon, which at all the times in this answer mentioned has provided and still provides as follows to-wit: "No tax or duty shall be imposed without the consent of the people, or their representatives in the legislative assembly, and all taxation shall be equal and uniform," and said pretended initiative measure is therefore null and void and of no effect.

XXIX.

That said pretended initiative measure is not a valid imposition of a license or tax upon this defendant or upon its gross receipts, or any part thereof, and this defendant denies that there is any license due plaintiff from defendant in any sum whatsoever or that there is any additional sum or any amount whatsoever due plaintiff from defendant for failure to pay the license referred to in the complaint, or any license, within the time stated in the complaint, or within or at any time, and denies that there is now due and owing, or due or owing, from defendant to plaintiff the sum of ninety-five hundred dollars and sixty-two cents ($9500.62), or any sum, license or otherwise, or the sum of nine hundred and fifty dollars and six cents ($950.06), or any sum, for failure to pay said sum of ninety-five hundred dollars and sixty-two cents ($9500.62), or any sum
38 within the time stated in the complaint, or within or at any time, or for any reason, or at all.

Wherefore, defendant prays that it be hence dismissed with its costs of suit.

EXHIBIT "A."

An act making effective the initiative and referendum provisions of section 1 of article IV of the constitution of the state of Oregon, and regulating elections thereunder, and providing penalties for violations of provisions of this act.

Be it enacted by the people of the state of Oregon, and be it enacted by the legislative assembly of the state of Oregon:

SECTION 1. The following shall be substantially the form of petition for the referendum to the people on any act passed by the legislative assembly of the state of Oregon:

Petition for Referendum.

To the Honorable —— ——, Secretary of State for the State of Oregon:

We, the undersigned citizens and legal voters of the state of Oregon, respectfully order that senate (house) bill number —, entitled (title of act) passed by the — legislative assembly of the state of Oregon, at the regular (special) session of said legislative assembly, shall be referred to the people of the state for their approval or rejection, at the regular general election to be held
39 on the — day of ——, 19—, and each for himself says: I have personally signed this petition; I am a legal voter of the state of Oregon; and my residence, postoffice, and voting precinct are correctly written after my name.

Name.	Residence—If in city, street and number.	Post office.	Voting precinct.

(Here follow twenty numbered lines for signatures.)

SECTION 2. The following shall be substantially the form of petition for any law or amendment to the constitution of the state of Oregon, proposed by the initiative:

Initiative Petition.

To the Honorable —— ——, Secretary of State for the State of Oregon:

We, the undersigned legal voters of the state of Oregon, respectfully demand that the following proposed (law) amendment to the constitution shall be submitted to the legal electors of the state of Oregon, for their approval or rejection, at the regular general election to be held on the — day of ——, 19—, and each for himself says: I

have personally signed this petition, and my residence, postoffice, and voting precinct are correctly written after my name.

Name.	Residence—If in city, street and number.	Post office.	Voting precinct.

(Numbered lines for twenty names on each sheet.)

40 Every sheet for petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed by initiative petition; but such petition may be filed with the secretary of state in numbered sections, for convenience in handling, and referendum petitions may be filed in sections in like manner.

SECTION 3. The county clerk of each county in which any such petition shall be signed shall compare the signatures of the electors signing the same with their signatures on the registration books and blanks on file in his office, for the preceding general election, and shall thereupon attach to the sheets of said petition containing such signatures, his certificate to the secretary of state, substantially as follows:

STATE OF OREGON,
County of ——, *ss:*

To the Honorable —— ——, Secretary of State for Oregon:

I, —— ——, county clerk for the county of ——, hereby certify that I have compared the signatures on (number of sheets) of the referendum (initiative) petition, attached hereto, with the signatures of said electors as they appear on the registration books and blanks in my office; and I believe that the signatures of (names of signers) numbering (number of genuine signatures) are genuine. As to the remainder of the signatures thereon, I believe they are not

41 genuine, except that the following names (——) do not appear on the registration books and blanks in my office.

(Signed) —— ——, *County Clerk.*
[Seal of office.] By —— ——, *Deputy.*

Every such certificate shall be *prima facie* evidence of the facts stated therein, and of the qualifications of the electors whose signatures are thus certified to be genuine, and the secretary of state shall consider and count only such signatures on such petitions as shall be so certified by said county clerks to be genuine: Provided, that the secretary of state may consider and count such of the remaining signatures as may be proved to be genuine, and that the parties so signing were legally qualified to sign such petitions, and the official certificate of a notary public of the county in which the signer resides shall be required as to the facts for each of such last named signatures; and the secretary of state shall further compare and

verify the official signatures and seals of all notaries so certifying with their signatures and seals filed in his office. Such notaries' certificates shall be substantially in the following form:

STATE OF OREGON,
County of ——, *ss:*

I, —— ——, a duly qualified and acting notary public in and for the above named county and state, do hereby certify: that I am personally acquainted with each of the following named electors whose signatures are affixed to the annexed petition, and I
42 know of my own knowledge that they are legal voters of the state of Oregon, and of the county and precincts written after their several names in the annexed petition, and that their residence and postoffice address is correctly stated therein, to-wit: (Names of such electors).

In testimony whereof I have hereunto set my hand and official seal this — day of ——, 19—.

—— ——,
Notary Public for Oregon.

The county clerk shall not retain in his possession any such petition, or any part thereof, for a longer period than two days for the first two hundred signatures thereon, and one additional day for each two hundred additional signatures, or fraction thereof, on the sheets presented to him, and at the expiration of such time he shall deliver the same to the person from whom he received it, with his certificate attached thereto, as above provided. The forms herein given are not mandatory, and if substantially followed in any petition, it shall be sufficient, disregarding clerical and merely technical errors.

SECTION 4. When any petition for the initiative or the referendum shall be filed with the secretary of state, he shall decide in the first instance whether or not the petition entitles the parties to have the measure referred to the people, under the provisions of section 1 of article IV of the constitution of Oregon, and either the
43 petitioners or the remonstrants, if any, may appeal to the supreme court of the state from the decision of the secretary of state, and the decision of the supreme court shall be final and conclusive upon the parties. The appealing party shall serve upon the secretary of state a written notice of the appeal from his decision, and the secretary of state shall thereupon transmit to the clerk of the supreme court a copy of his decision, together with such certified copies of the original papers and documents in the case as may be demanded by any of the parties.

SECTION 5. Immediately upon the filing of any such petition for the referendum or the initiative with the secretary of state, signed by the number of voters and filed within the time required by the constitution, he shall notify the governor in writing of the filing of such petition, and the governor shall forthwith issue his proclamation, announcing that such petition has been filed, with a brief statement

of its tenor and effect. Said proclamation shall be published four times in four consecutive weeks in one daily or weekly newspaper in each judicial district of the state of Oregon.

SECTION 6. The secretary of state, at the same time that he furnishes to the county clerks of the several counties certified copies of the names of the candidates for state and district offices, shall furnish to said county clerks his certified copy of the titles and num-
44 bers of the various measures to be voted upon at the ensuing general election, and he shall use for each measure a title designated for that purpose by the legislative assembly, committee, or organization presenting and filing with him the act, constitutional amendment, or petition for the initiative or the referendum: Provided, that such title shall in no case exceed twenty words, and shall not resemble any such title previously filed for any measure to be submitted at that election, which shall be descriptive of said measure, and he shall number such measures; and such titles shall be printed on the official ballot in the order in which the acts referred by the legislative assembly and petitions by the people shall be filed in his office. The affirmative of the first measure shall be numbered 300 and the negative 301, in numerals, and the succeeding measures shall be numbered consecutively 302, 303, 304, 305, and so on at each election. It shall be the duty of the several county clerks to print said titles and numbers upon the official ballot, in the order presented to them by the secretary of state, and the relative position required by law. Measures proposed by the initiative shall be designated and distinguished from measures proposed by the legislative assembly by the heading, "Proposed by Initiative Petition."

SECTION 7. The manner of voting upon measures sub-
45 mitted to the people shall be the same as is now required and provided by law; and no measure shall be adopted unless it shall receive an affirmative majority of the total number of effective votes cast on such measure and entitled to be counted under the provisions of this act; that is to say, supposing seventy thousand ballots to be properly marked on any measure, it shall not be adopted unless it shall receive more than thirty-five thousand affirmative votes.

SECTION 8. The secretary of state shall, not later than the first Monday of the third month next before any general election at which any proposed law or amendment to the constitution is to be submitted to the people, cause to be printed a true copy of the title and text of each measure to be submitted, with the number and form in which the question will be printed on the official ballot. The paper to be used for the covers of such pamphlets shall be twenty by twenty-five inches, and fifty pounds weight to the ream. The persons, committees, or duly authorized officers of any organization filing any petition for the initiative, but no other person or organization, shall have the right to place with the secretary of state for distribution, any pamphlets advocating such measure, not later than the first Monday of the fifth month before the regular general election at which the measure is to be voted on; any person, committee, or organization opposing any measure may place with the
46 secretary of state for distribution any pamphlets they may desire, not later than the first Monday of the fourth month

immediately preceding such election; as to pamphlets advocating or opposing any measure referred to the people by the legislative assembly, they shall be governed by the same rules of time, but they may be placed with the secretary of state by any person, committee, or organization: Provided, that all such pamphlets shall be furnished to the secretary of state in sheets of uniform size, as follows: Size of pamphlet page to be six inches wide by nine inches long; size of type page to be twenty-six ems pica wide by forty ems pica long, set in long primer or ten-point type, and printed on sized and supercalendered paper, twenty-five by thirty-eight inches, weighing fifty pounds to the ream. All such pamphlets shall be furnished to the secretary of state at the sole expense of the persons interested, and without cost to the state. In no case shall the secretary of state be obliged to receive any such pamphlets unless a sufficient number is furnished to supply one to every legal voter in the state, but in such case, he shall forthwith notify the persons offering the same of the number required. The secretary of state shall cause one copy of each of said pamphlets to be bound in with his copy of the measures to be submitted as herein provided. The title page of every such pamphlet shall show the official numbers for and against, and the ballot title of the measure to
47 which it refers, and whether it is intended to favor or oppose such measure, and by whom it is issued. The secretary of state shall distribute to each county clerk, before the second Monday in the third month next preceding such regular general election, a sufficient number of said bound pamphlets to furnish one copy to every voter in his county. Every registration officer, after the receipt by the county clerk of such pamphlets, shall deliver to every voter thereafter as he is registered, one copy of the same, and said registration and delivery shall be a part of the official duty of every officer who registers voters, and his registration fee or wages shall be full compensation for this additional service. The secretary of state shall not be obliged to receive or distribute any pamphlets advocating or opposing any measure unless the same shall be filed with him within the time herein provided.

SECTION 9. The votes on measures and questions shall be counted, canvassed, and returned by the regular boards of judges, clerks, and officers as votes for candidates are counted, canvassed, and returned, and the abstract made by the several county clerks of votes on measures shall be returned to the secretary of state on separate abstract sheets, in the manner provided by section 2833 of Bellinger and Cotton's Annotated Codes and Statutes of Oregon for abstracts of votes for state and county officers. It shall be the duty of the
48 secretary of state, in the presence of the governor, to proceed within thirty days after the election, and sooner if the returns be all received, to canvass the votes given for each measure, and the governor shall forthwith issue his proclamation, which shall be published in like manner as other proclamations herein provided for, giving the whole number of votes cast in the state for and against each measure and question, and declaring such measures as are approved by a majority of those voting thereon to be in full force and

effect as the law of the state of Oregon from the date of said proclamation.

SECTION 10. Every person who is a qualified elector of the state of Oregon may sign a petition for the referendum or for the initiative. Any person signing any name other than his own to any such petition, or signing the same more than once for the same measure at one election, or who is not at the time of signing the same a legal voter of this state, or any officer or any person willfully violating any provision of this statute, shall, upon conviction thereof, be punished by a fine not exceeding $500, or by imprisonment in the penitentiary not exceeding two years, or by both such fine and imprisonment, in the discretion of the court before which such conviction shall be had.

Passed the house February 12, 1903.

Passed the senate February 18, 1903.

Approved February 24, 1903.

Filed in the office of the secretary of State February 24, 1903.

(Here follows ballot marked p. 48*a*.)

EXHIBIT R

EXHIBITS

NOT

SUITABLE

FOR

MICRO-

FILMING

And on the — day of October, 1907, the plaintiff filed its

Demurrer

to the answer of the defendant, as follows:

(Title.)

Now comes the plaintiff, by A. M. Crawford, its attorney general, and John Manning, district attorney for the fourth judicial district of the state of Oregon, and:

I.

Demurs to the further answer of the defendant corporation to the complaint herein, and to the whole thereof, for the reason that it appears upon the face thereof that the new matter set forth therein does not constitute defense to the cause of action set forth in the complaint, nor to any part thereof.

II.

Plaintiff separately demurs to the new matter set forth in counts numbered one to twenty-three, both inclusive, in defendant's further answer to the complaint herein, for the reason that the facts therein contained do not constitute a defense to the complaint nor to any part thereof.

III.

Plaintiff separately demurs to the new matter set forth in counts numbered 24 to 29, both inclusive, in defendant's further answer, for the reason that the facts therein contained do not constitute a defense to the complaint nor to any part thereof.

Plaintiff separately demurs to each count of defendant's further answer to the complaint therein for the reason that the facts contained in any count thereof do not constitute a defense to the complaint nor to any part of the same.

And on the 9th day of March the court made an

Order

granting defendant's application to strike from its answer paragraphs 24, 25, 26 and 27 thereof; said order being in words and figures as follows:

(Title.)

This cause coming on to be heard upon the application of the defendant for leave to strike from the answer of the defendant paragraphs 24, 25, 26 and 27 of said answer, the plaintiff appearing by Hon. A. M. Crawford, attorney general of the state of Oregon, the

defendant appearing by Messrs. Carey & Kerr and Harrison Allen of counsel for defendant; and the court being sufficiently advised in the premises:

It is ordered and adjudged that the application to strike from said answer said paragraphs 24, 25, 26 and 27 be and the same is hereby granted.

And it further appearing to the court that a demurrer to
51 the answer herein was heretofore filed by the plaintiff in this behalf, by consent of plaintiff and defendant,

It is ordered and adjudged that said demurrer as filed shall stand as a demurrer to said paragraphs 24, 25, 26 and 27 eliminated.

Dated March 9, 1908.

By the Court,

JOHN B. CLELAND,
Circuit Judge.

And on the 9th day of March, 1908, a demurrer to the answer of the defendant was submitted, and the court made the following ruling thereon and entered a

Judgment

sustaining demurrer, etc., as follows:

(Title.)

Now at this time, this matter coming on to be heard upon the demurrer of the plaintiff to the answer of the defendant, the plaintiff appearing by A. M. Crawford, attorney general, and the defendant appearing by Carey & Kerr, and Harrison Allen, of counsel, and the court being fully advised in the premises:

It is hereby considered, ordered and adjudged that the demurrer be and the same hereby is in all things sustained.

And the defendant in open court announced that it declined to amend or plead further, but would stand upon its answer
52 whereupon, upon motion of plaintiff's attorney for judgment upon the complaint,

It is considered, ordered, and adjudged that the plaintiff have judgment in accordance with the prayer of its complaint, and that it have and recover of and from the defendant the sum of ten thousand four hundred fifty and 68-100 dollars ($10,450.68), and that execution issue therefor.

Whereupon the defendant in open court gave notice that it appealed from said judgment and the whole thereof to the supreme court of the state of Oregon, which said appeal was allowed by the court, and directed to be entered in the record.

Dated March 9, 1908.

By the court,

JOHN B. CLELAND,
Circuit Judge.

And on the 18th day of March, 1908, the defendant filed its undertaking on appeal which was duly served on the plaintiff-respondent.

Assignment of Errors.

And The Pacific Telephone and Telegraph Company, the defendant corporation and appellant herein, by its attorneys, says that in the record and proceedings in the within and foregoing entitled matter there is manifest error in this, to-wit:

I. That the circuit court of the state of Oregon, for Mult-
53 nomah county, erred in sustaining the demurrer to the answer of the appellant.

II. That the said court erred in holding that the people of the state of Oregon had authority to adopt, by popular vote, an alleged amendment to section 1 of article IV of the constitution of the state of Oregon, known as the "initiative and referendum amendment," pretending to reserve unto the people the power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserving the power, at their own option, to approve or reject at the polls any act of legislative assembly. That said court erred in deciding that said pretended amendment to section 1, of article IV of the constitution of the state of Oregon was and is now in force.

III. That the said court erred in deciding that pursuant to said pretended amendment to section 1 of article IV of the constitution of the state of Oregon, the legislative assembly had authority to and did pass "An act making effective the initiative and referendum, and referendum provisions of section 1 of article IV of the constitution of the state of Oregon, and regulating elections thereunder, and providing penalties for the violation of the provisions of this act," which said act is designated in the answer herein as "Exhibit A," and that said act was, and is now, in force and effect.

54 IV. That the said court erred in deciding that pursuant to said pretended amendment to section 1 of article IV of the constitution of the state of Oregon, and pursuant to said pretended act making effective the initiative and referendum under the provisions of section 1 of article IV, a measure proposed by filing petitions with the secretary of state of the state of Oregon, requiring express, telephone and telegraph companies engaged in business within the state of Oregon, to pay a license tax of two per cent. upon their gross receipts, and fully set forth in the answer herein, was legally approved at a general election held in said state on the 4th day of June, 1906, or was legally approved by a majority of the votes cast at said election, or that the said proposed measure and the result thereof were promulgated by proclamation of the governor of said state, and published as chapter I of the laws of 1907 of the state of Oregon, and thereby became a law.

V. That the said court erred in deciding, under and by virtue of the provisions of said chapter I of the laws of 1907 of the state of Oregon, that the said Pacific States Telephone and Telegraph Com-

pany became or was liable to the state of Oregon in the sum of $9,500.62, taxes, or the sum of $950.05 as a penalty for failure to pay the sum of $9,500.62, or in any sum or amount.

55 VI. That the said court further erred in deciding that the said pretended initiative measure was or is a valid law of the state of Oregon, for the following reasons:

1. That at the time said pretended initiative measure was voted on as aforesaid, and at the time the same was promulgated by the governor of the state of Oregon as aforesaid, the legislative assembly of the state of Oregon was not in session.

2. That there was no session of the legislative assembly of the state of Oregon held between the month of February, 1906, and the month of January, 1907.

3. That said pretended initiative measure was not considered or enacted or published as a law or otherwise by the legislative assembly of the state of Oregon.

4. That said pretended initiative measure was not considered by or submitted to the deliberations of, or read before its pretended enactment by, and was not enacted by, any legislative or other representatives of the people, or of any part of the people, of the state of Oregon, or any legislative assembly or assemblies of representatives of the people, or of any part of the people, of the state of Oregon.

5. That said pretended initiative measure, before its pretended enactment, was not submitted to, or considered by and was not approved by, the governor of the state of Oregon, or any executive, or administrative, or other officer, or official, of the government of the state of Oregon, or any representative of the people, or of any part of the people, of the state of Oregon.

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6. That said pretended initiative measure was never introduced before or referred to or considered by or passed upon by, or in any way acted upon by any representatives of the people, or of any part of the people, of the state of Oregon, or by any officer or branch or department of the government of said state.

7. But said pretended initiative measure was enacted, so far as it has been enacted at all, wholly and solely by the direct vote of a majority of the voters of the state of Oregon voting at said election, and in the manner before stated, and not otherwise.

8. That said pretended initiative measure was proposed and voted on and promulgated as hereinbefore set forth, solely pursuant to the provisions and under the sole authority of said pretended amendment, and of said pretended act Exhibit "A," and not otherwise.

9. That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A," if enforced, will render nugatory and will destroy the representative legislative assembly and the legislative power of the representative legislative assembly of the state of Oregon contrary to and in violation of the provisions contained in article I, section 2, and in article I, section 3, and in article I, section 4, and in article I, section 8, and in article IV, section 3, and in article IV, section 4, and in article V, and in article VI, of the constitution of the United States, and in article XIV of the amend-

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ments to the constitution of the United States, that the several states of the union shall create and maintain representative legislative assemblies; and because said pretended amendment and said pretended act Exhibit "A," are and each of them, is contrary to and in violation of the implied provision of the constitution of the United States that the government of the several states shall be representative in form and that the several states shall create and maintain representative legislative assemblies.

10. That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" purport, and each of them purports, to create and provide for a legislature, to-wit: A part of the voters of the state of Oregon not elected by the people of the state of Oregon and purport, and each of them purports, to abrogate the existence of electors for the most numerous branch of the legislature of said state, to-wit: a part of the voters of said state, thereby making impossible the determination of the qualifications necessary in the state of Oregon for electors of the members from said state of the house of repre-
58 sentatives of the United States, contrary to and in violation of the provisions of section 2, article I, of the constitution of the United States that the house of representatives shall be composed of members chosen every second year by the people of the several states, and that the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

11. That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive, and purport, and each of them purports, to deprive the representative legislative assembly of the state of Oregon of the power to consent to the purchase by the congress of the United States of places in the state of Oregon for the erection of forts, magazines, arsenals, dockyards, and other needful buildings contrary to and in violation of the provisions of section 8, article I, of the constitution of the United States.

12. That said initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive and purport, and each of them purports, to deprive the representative legisla-
59 tive assembly of the state of Oregon of the power to prescribe the times, place and manner of the holding elections for senators and representatives in the congress of the United States, contrary to and in violation of the provisions of section 4, article I, of the constitution of the United States.

13. That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" empower, and each of them empowers, a part of the voters of the state of Oregon, by their direct vote, to deprive and purport and each of them purports to deprive representative legis-

lative assembly of the state of Oregon of the power to direct the man
ner in which the state of Oregon shall appoint electors for the elec
tion of the president and vice-president of the United States o
America, contrary to and in violation of the provisions of section 1
article XI of the constitution of the United States.

14. That said pretended initiative measure is null and void an
of no effect because said pretended amendment and said pretende
act Exhibit "A" empower, and each of them empowers, a part of th
voters of the state of Oregon, by their direct vote, to deprive and pu
port, and each of them purports, to deprive the representative legi
lative assembly of the state of Oregon of the power to consent to th
junction of the state of Oregon with one or more states o
60 parts of states of the union, contrary to and in violation of th
provisions of section 3, article IV, of the constitution of th
United States.

15. That said pretended initiative measure is null and void an
of no effect because said pretended amendment and said pretende
act Exhibit "A" empower, and each of them empowers, a part of th
voters of the state of Oregon, by their direct vote, to deprive, an
purport, and each of them purports, to deprive the representativ
legislative assembly of the state of Oregon of the power to apply
the United States for protection against domestic violence within th
state of Oregon, contrary to and in violation of the provisions o
section 4, article IV, of the constitution of the United States.

16. That said pretended initiative measure is null and void an
of no effect because said pretended amendment and said pretende
act Exhibit "A," empower, and each of them empowers, a part o
the voters of the state of Oregon, by their direct vote, to deprive, an
purport, and each of them purports, to deprive the representativ
legislative assembly of the state of Oregon of the power to apply
the congress of the United States for a convention for proposin
amendments to the constitution of the United States, and of th
power to ratify amendments proposed to the constitution of th
United States, contrary to and in violation of the provision
61 of article V, of the constitution of the United States.

17. That said pretended initiative measure is null and voi
and of no effect because said pretended amendment and said pr
tended act Exhibit "A" empower, and each of them empowers,
part of the voters of the state of Oregon, by their direct vote, to d
prive and purport, and each of them purports, to deprive the repr
sentative legislative assembly of the state of Oregon of the power
choose the senators from said state for the senate of the United Stat
contrary to and in violation of the provisions of section 3, of artic
I, of the constitution of the United States.

18. That said pretended initiative measure and said pretende
amendment and said pretended act Exhibit "A" are, and each o
them is, contrary to and in violation of the rights, privileges and im
munities of the defendant under and pursuant to the provisions o
section 4, of article IV, of the constitution of the United States, an
are, and each of them is, contrary to and in violation of the pr
visions of section 4, article IV, of the constitution of the Unite

States, and are, and each of them is, unrepublican and contrary to and inconsistent with and violative of a republican form of government, and therefore are, and each of them is, null and void and of no effect.

19. That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pre-
62 tended act Exhibit "A" purport, and each of them purports, to provide for and pretend, and each of them pretends, to create a legislative body or legislature in the state of Oregon, to-wit: a part of the voters of said state prepared and empowered at all times and continuously to enact legislation contrary to and in violation of the provisions of section 3, article I, and of section 4, of article IV, of the constitution of the United States that the legislatures of the several states of the Union shall at times take a recess and shall from time to time meet and convene and be convened and adjourn, and contrary to and in violation of the provisions, and in derogation of the powers conferred upon the executive of the state of Oregon by the provisions of said section 3 of said article I, that the executive of a state may make temporary appointments to the senate of the United States during a recess of the legislature of said state, and of said section 4, of said article IV, that the executive of a state may apply to the United States for protection against domestic violence when the legislature cannot be convened.

20. That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" will, and each of them will, if enforced, create a legislature consisting wholly or in part of the voters of said state, acting as a legislature, or as a part of the legislature of said
63 state, without their election as legislators and solely by reason of, and in their capacity as voters.

21. That said pretended amendment and said pretended act Exhibit "A" purport and undertake, and each of them purports and undertakes, to confer upon a part of the voters of the state of Oregon, as such, a part or all of the power to choose the senators from said state for the senate of the United States, and to consent to the purchase by the congress of the United States of places in the state of Oregon for the erection of forts, magazines, arsenals, dockyards and other needful buildings, and to prescribe the times, places and manner of holding elections for senators and representatives in the congress of the United States, and to direct the manner in which the state of Oregon shall appoint electors for the election of the president and vice-president of the United States, and to consent to the junction of the state of Oregon with one or more states, or parts of states, of the Union, and to apply to the United States for protection against domestic violence within the state of Oregon, and to apply to the congress of the United States for a convention for proposing amendments to the constitution of the United States, and to ratify amendments proposed to the constitution of the United States contrary to and in violation of the provisions respectively of section 3, of article I, and of section 4 of article I, and of section 8 of
64 article I, and of section 1 of article XI, and of section 3 of article IV, and of section 4 of article IV, and of article V of

the constitution of the United States hereinbefore referred to, th
said powers shall be exercised by the legislatures, to-wit: Represent
tive legislative assembly of the several states, as hereinbefore
forth.

22. That said pretended initiative measure was not passed or e
acted or adopted or promulgated in accordance with due proce
of law as prescribed by section 1, of article XIV, of the amendmen
of the constitution of the United States, and that the pretend
license or tax upon this defendant, or upon its gross receipts, purpo
ing to be levied upon or assessed against defendant, or its gross r
ceipts, by said pretended initiative measure is not levied or assess
by due process of law, and if defendant be compelled to pay sa
pretended license or tax, defendant will be deprived of its proper
without due process of law, contrary to and in violation of the right
privileges and immunities of defendant under said section 1
article XIV of the amendments to the constitution of the Unite
States, and said pretended initiative measure denies to defenda
the equal protection of the laws, contrary to and in violation of th
rights, privileges and immunities of defendant under said section
of article XIV of the amendments of the constitution of the Unite
States.

65 23. That at the time the state of Oregon was admitted in
the Union by said act of congress, approved February 1
1859, as aforesaid, the state government and constitution of the sta
of Oregon were republican in form and in conformity with th
constitution of the United States, and said state of Oregon was
admitted to the Union upon the condition contained in said act
congress that the state government and constitution of the state
Oregon should be republican in form and in conformity with th
constitution of the United States; that, as hereinbefore set fort
said pretended amendment and said pretended act Exhibit "A" ar
and each of them is, unrepublican in form and not in conformit
with, but is contrary to, and in violation of, a republican form
government, and of the constitution of the United States, and co
trary to and in violation of the said act of congress, and the cond
tion of said act, approved February 14th, 1859, and contrary to an
in violation of the rights, privileges and immunities under said a
of congress of this defendant, a resident of said state of Oregon, an
duly incorporated under and by virtue of the laws of the said stat
and said pretended initiative measure, proposed and voted upon an
promulgated pursuant to the provisions of said pretended amen
ment and of said pretended act Exhibit "A" as aforesaid, is therefo
null and void and of no effect.

24. That said pretended amendment and said pretende
66 act Exhibit "A" empower, and each of them empowers,
part of the voters of the state of Oregon by their direct vo
to deprive and purport, and each of them purports, to deprive th
legislative assembly of the state of Oregon of the powers conferr
upon the legislative assembly of the state of Oregon by the prop
sitions made by the congress of the United States to the people
the state of Oregon, by section 4 of the act entitled: "An act for th

admission of Oregon into the Union," approved February 14th, 1859, regarding the use and disposition of the public lands and the salt springs and of the net proceeds of sales of public lands, and by the acceptance of said propositions by means of the act of the legislative assembly of the state of Oregon entitled: "An act relative to certain propositions made by the congress of the United States to the people of the State of Oregon," in effect September 2nd, 1859; and said pretended amendment and said pretended act Exhibit "A" purport and undertake, and each of them purports and undertakes, to confer upon a part of the voters of the state of Oregon as such, a part or all of said powers.

25. That said pretended amendment and said pretended act Exhibit "A" do, and each of them does, impair the obligation of the contract between the state of Oregon and the United States of America as contained in said act of congress, approved Feb-
67 ruary 14th, 1859, and in the acceptance of the propositions therein made by the congress of the United States to the people of the state of Oregon and accepted by the people of the state of Oregon, by said act of the legislative assembly of the state of Oregon, in effect September 2, 1859, to-wit: the contractual obligation of the state of Oregon to maintain a government republican in form and in conformity with the constitution of the United States, and to preserve to the legislative assembly of the state of Oregon the power to use and dispose of the public lands and the salt springs and the net proceeds of sales of public lands in the state of Oregon, contrary to and in violation of section 10, of article I, of the constitution of the United States that no state shall pass a law impairing the obligation of a contract, and said pretended initiative measure is therefore null and void and of no effect.

26. That said pretended initiative measure is null and void and of no effect because said pretended amendment and said pretended act Exhibit "A" purport, and each of them purports, to create within the state of Oregon a legislature, or a part of a legislature, to-wit: a part of the voters of the state of Oregon empowered to legislate, without taking the oath or affirmation required by Article VI of the constitution of the United States, and without taking the oath of office required by the act of congress approved June 1, 1789, section 1836 of the revised statutes of the United States, 1
68 Statutes at Large, 23, contrary to and in violation of said article VI of the constitution of the United States and of the provisions of said act approved June 1, 1789.

27. That said pretended initiative measure is null and void and of no effect because none of the voters of the state of Oregon voting on passage of said pretended initiative measure and in favor thereof, as hereinbefore set forth, did prior to so voting, take the oath or affirmation required by article VI of the constitution of the United States, or by the said act of congress approved June 1, 1789, contrary to and in violation of said article VI of the constitution of the United States, and contrary to and in violation of the provisions of said act.

28. That the authorized capital stock of this defendant exceeds $2,000,000; that under and by virtue of the provisions of an act of

the people of the state of Oregon and of the legislative assembly o
the state of Oregon, entitled: "An act to provide for the licensing
of domestic corporations and foreign corporations, joint stock com
panies and associations," etc., approved February 16, 1903, requiring
corporations doing business in the state of Oregon to pay an annua
license fee proportionate to their authorized capital stock, this de
fendant, prior to said pretended enactment of said pretended initia
tive measure purporting and undertaking to levy said tax upon th
gross receipts of this defendant, did pay and ever since ha
69 paid at the times and in the manner provided by law, a
annual license fee of $200; that in the manner and at th
times provided by law defendant, pursuant to the laws of the stat
of Oregon, did prior to said pretended enactment of said pretende
initiative measure pay, and has ever since paid, state, county an
school taxes levied in said state upon all of its property within th
state of Oregon, including its franchise to do the business in sai
state which said pretended initiative measure purports and under
takes to tax and which said taxes upon its said property, includin
its said franchise, have been and still are from time to time levie
and assessed against this defendant by the county of Multnomah, i
said state.

29. That said pretended initiative measure purporting and under
taking to levy said tax upon gross receipts of this defendant, is con
trary to and in violation of section 32 of article I of the constitutio
of the state of Oregon, which at all the times in this answer men
tioned, has provided, and still provides, as follows, to-wit: "No ta
or duty shall be imposed without the consent of the people, or thei
representatives in the legislative assembly, and all taxation shall b
equal and uniform," and said pretended initiative measure is there
fore null and void and of no effect.

30. That said pretended initiative measure is not a valid imposi
tion of a license or tax upon this defendant or upon its gros
70 receipts, or any part thereof, and there is no license due plain
tiff from defendant in any sum whatsoever, nor is there an
additional sum or any amount whatsoever due plaintiff from de
fendant for failure to pay the license referred to in the complaint
or any license, within the time stated in the complaint, or within o
at any time.

E. S. PILLSBURY,
CAREY & KERR, AND
HARRISON ALLEN,
Attorneys for Appellant.

71 & 72 *Index.*

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72½ And afterwards, on the 18th day of March, 1908, the following

Undertaking on Appeal

was filed:

(Venue & Title of Cause.)

Whereas, the defendant in the above entitled action appeals to the Supreme Court of the State of Oregon from the judgment made and entered against the defendant in the said action in the said Circuit Court in favor of the plaintiff in the said action on the 9th day of March, A. D. 1908, for ten thousand four hundred fifty and 68/100 dollars ($10,450.68):

Now, therefore, in consideration of the premises and of such appeal we, the undersigned, The Pacific States Telephone and Telegraph Company, a corporation organized and existing under the laws of the state of Oregon, and National Surety Company, a corporation organized and existing under the laws of the state of New York, and authorized to act as surety on bonds within the state of Oregon, do hereby, jointly and severally.

Undertake and promise on the part of the appellant that the said appellant will pay all damages, costs and disbursements which may be awarded against it on the appeal; and

Whereas, the appellant, The Pacific States Telephone and Telegraph Company, is desirous of staying execution of the said judgment so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally

Undertake and promise that if the said judgment appealed from, or any part thereof, be affirmed, the appellant will satisfy it so far as affirmed.

Dated March 16, 1908.

THE PACIFIC STATES TELEPHONE
AND TELEGRAPH COMPANY.
By JNO. W. KILKYSON, *Div. Supt.*
NATIONAL SURETY COMPANY,
By JAS. McI. WOOD AND
J. COUCH FLANDERS,
Its Attorneys in Fact.

[Cor. Seal, N. S. Co.]

STATE OF OREGON,
County of Marion, ss:

Due service of within and foregoing undertaking on appeal is hereby acknowledged at Salem, Oregon, March 17, 1908.

A. M. CRAWFORD,
Of Attorneys for Plaintiff,
By I. H. VAN WINKLE.

73 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Respondent,

v.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant.

Appeal from the Circuit Court for Multnomah County—The Honorable John B. Cleland, Judge.

Argued and Submitted Jan. 5, 1909.

A. M. Crawford and A. S. Bennett, for Respondent. C. H. Carey, for Appellant.

Bean, J.

Affirmed.

* * * * * * *

Filed Feb. 2, 1909.

J. C. MORELAND, *Clerk.*
By —— ——, *Deputy.*

74 This is an action by the State against the Pacific States Telephone and Telegraph Company to recover two per cent. of the gross receipts of such Company for the year 1906. The case is as follows: In 1903 the legislature passed an act requiring all corporations, domestic and foreign, doing business in the State, to pay an annual license fee of from ten to two hundred dollars according to their capital stock (Laws 1903, 39). In 1906 there was proposed by an initiative petition and adopted by the people in June of that year, pursuant to the provisions of the initiative and referendum amendment to the Constitution, and without reference to the legislature, an act requiring telephone and telegraph companies to pay a license of two per cent. per annum on the gross receipts of the Company, and requiring such corporations to make annual statements to the state treasurer of the amount of such receipts as a basis for such tax. The defendant corporation is an Oregon concern and made the returns, required by the act, for the year 1906, but refused to pay the tax thereon, and hence this suit. It answered the complaint, denying liability on the grounds: (1) that the initiative act requiring it to pay such license or tax was never approved by the Governor, nor submitted to him for his approval; (2) that the defendant has paid the annual license fee required by the act of 1903, and also all state, county, and school taxes levied upon all of its property, "including its franchise to do business," and, therefore, the act of 1906 is unconstitutional and void because violative of § 32, Art I of the State constitution, requiring that "all taxation shall be equal and uniform"; (3) that the initiative and referendum amendment to the constitution, under which the act of 1906 was proposed and adopted, is unconstitutional and void, because repugnant to §§ 2, 3, 4, and 8 of Art. I; § 1 of Art. II, §§ 3 and 4 of Art.

IV; Art. V; Art. VI; and § 1 of the XIV amendment to the constitution of the United States; and also to the act of Congress of February 14, 1859, admitting Oregon to the Union, and the act approved June 1, 1789 (Rev. Stat. U. S. § 1836). Other grounds of objection are set forth in paragraphs 24, 25, 26 and 27 of the answer, but were stricken out on application of the defendant.

The plaintiff demurred to the new matter pleaded in the answer, on the ground that it did not constitute a defense to the cause
75 of action stated in the complaint. The demurrer was sustained, judgment rendered in favor of plaintiff and defendant appeals.

BEAN, *J.*:

The question whether an initiative measure is subject to the veto power of the governor was decided in *State v. Kline,* 50 Or. 426, and that case is conclusive here. What is said on the subject in *Kadderly v. Portland,* 44 Or. 118, 146, was in answer to the point, that the initiative and referendum amendment deprived the governor of a veto power over acts of the legislature and had no reference to measures proposed by the initiative. The annual license fee required by the act of 1903 to be paid by corporations is a business or excise tax on the right to be or exercise the powers of a corporation, and is in no sense a tax on property, nor is it a tax on the business or franchise which the corporation, when organized, may exercise: *Am. S. & R. Co. v. People,* 34 Col. 240; *Delaware* R. R. Tax, 18 Wall. 206; *Home Ins. v. New York,* 134 U. S. 594.

The right to be a corporation, or to do business as such, rests entirely within the discretion of the State, and it may, therefore, require it to pay a specified sum each year, or at stated intervals, for the privilege. The payment of such fee or tax, however, does not exempt the corporation from other forms of taxation. It may be also required to pay a tax on its tangible property and a tax on its intangible property or franchise, the latter to be in proportion to its income or measured in any other way the law making power may adopt: (27 Enc. Law. 832; 57 L. R. A. 98, note.)

"The State," says Mr. Justice Field, "may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." 18 Wall. 231, *supra.*

See also *Maine v. Grand Trunk Ry. Co.,* 142 U. S. 217.

Among the elements of corporate taxable values are, the franchise; capital stock in the hands of the corporation; the tangible corporate property; and shares of stock in the hands of individual holders. And all of the authorities agree that a tax upon the franchise,

whether based on income or measured in some other manner,
76 and a tax on the tangible corporate property, is not double taxation: Cooley on Taxation, 406; *Commissioners v. Tabacco Co.* 116 N. C. 441; *Home Ins. Co. v. New York*, 117 U. S. 129; *Commonwealth v. New England State and Tile Co.*, 13 Allen, 391; *Commonwealth v. R. R. Co.* 150 Pa. St., 234; *Wil. Col. & Augusta R. R. Co. v. Board of Comm'rs of Brunswick Co.*, 72 N. C. 10; *State Tax Ry. on Gross Receipts*, 15 Wall. 284. Nor does the fact that plaintiff may have paid all taxes assessed and levied on its property, "including the value of its franchise" render invalid the law levying a tax on its gross income. At the time the assessment and levy alluded to were made, there was no law specifically requiring the franchise of a corporation to be assessed, nor providing the manner of estimating the value thereof, and clearly a law on the subject regularly enacted could not be rendered nugatory or invalid by local assessors including in the value of corporate property their estimate of the value of the franchise.

Whether the initiative and referendum amendment to the constitution is invalid, because repugnant to the provisions of the constitution of the United States, was thoroughly argued to and considered by this court in *Kadderly v. Portland*, and the views of the court as then and now entertained are indicated in the opinion filed in that case, and it is needless to restate them at this time.

It follows from these views that the judgment of the court must be affirmed and it is so ordered.

77 Be it remembered that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday, the 5th day of October, 1908. Present: Hon. Frank A. Moore, Chief Justice; Hon. Robert Eakin, Associate Justice; Hon. Robert S. Bean, Associate Justice, and J. C. Moreland, Clerk, the following proceedings were had on Tuesday the 2d day of February, 1909, the same being the thirty-eighth judicial day of said term:

STATE OF OREGON, Respondent,

vs.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant.

Appeal from Multnomah County.

This cause having, on the 5th day of January, 1909, been duly argued and submitted to the court upon and concerning all the questions arising upon the transcript and record, and then reserved for further consideration. And the court having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs, finds that there is not error as alleged. It is therefore ordered and adjudged by the court that the judgment of the court below in this cause rendered and entered, be and the same is, in all things affirmed.

And the said appellant having given an undertaking on appeal, and also as a stay, with the National Surety Company, as surety, it is ordered that the respondent recover off and from the appellant and said National Surety Company, its said surety, the sum of ten thousand four hundred and fifty dollars and sixty-eight dents ($10,450.68), with interest thereon since the 18th day of March, 1908, at the rate of six per cent. per annum, and its costs and disbursements in this court taxed at $

And it is further ordered that this cause be remanded to the court below from which this appeal was taken with directions to enter a judgment in accordance herewith.

78 In the Supreme Court of the State of Oregon.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,
vs.
STATE OF OREGON, Respondent.

Assignment of Errors on Writ of Error to the Supreme Court of the United States.

Now comes the Pacific States Telephone and Telegraph Company appellant in the above entitled cause, and plaintiff in error to the Supreme Court of the United States, by its attorneys, and files herewith its petition for writ of error, and avers and shows:

That in the records and proceedings of the above entitled cause, the Supreme Court of the State of Oregon erred to the grievous injury and wrong of the plaintiff in error herein and to the prejudice and against the rights of plaintiff in error, and for the purpose of having said proceedings in the above entitled cause reviewed in the Supreme Court of the United States, plaintiff in error presents the following assignment of errors and prayer for reversal of decision in the above entitled cause in this Court, by the Supreme Court of the United States:

First. The Supreme Court of the State of Oregon erred in affirming the judgment of the Circuit Court of the State of Oregon for Multnomah County sustaining the demurrer to the answer filed in the said Circuit Court of said County and State herein, and in not over-ruling said demurrer.

Second. The Supreme Court of the State of Oregon erred in rendering a judgment in favor of the plaintiff in said Circuit Court and defendant in error herein, and in not awarding a decree against said plaintiff and defendant in error herein, and in favor of the defendant and plaintiff in error herein.

79 Third. The Supreme Court of Oregon erred in holding and deciding that the alleged amendment to Section 1 of Article IV of the Constitution of the State of Oregon, known as the "Initiative and Referendum Amendment" pretending to reserve unto the people the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the Legis-

lative Assembly, and also reserving the power at their own option to approve or reject at the polls any act of the Legislative Assembly, was not contrary to and in violation of the following provisions of the Constitution of the United States namely:

(*a*) Art. 1, Sec. 2, Clause I:

"The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

(*b*) Art. 1, Sec. 3:

"The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote."

(*c*) Art. 1, Sec. 4:

"The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof."

(*d*) Art. 1, Sec. 8, Clause 17:

"The Congress shall have power * * * To exercise exclusive legislation * * * over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

(*e*) Art. II, Sec. 1, Clause 2:

"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole
80 number of senators and representatives to which the state may be entitled in the congress."

(*f*) Art. IV, Sec. 3:

"New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress."

(*g*) Art. IV, Sec. 4:

"The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence."

(*h*) Art. V:

"The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress."

(*i*) Art. VI:

"This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

"The senators and representatives before mentioned, and
81 the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution, but no religious test shall ever be required as a qualification to any office or public trust under the United States."

(*j*) XIV Amendment, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fourth. The Supreme Court of Oregon erred in holding and deciding that said pretended Initiative and Referendum Amendment and the act of the legislature of the State of Oregon referred to in the answer in the cause in said Circuit Court of Multnomah County, in said state aforesaid, entitled, "An Act making effective the Initiative and Referendum Provisions of Section 1 of Article IV of the Constitution of the State of Oregon and Regulating Elections thereunder and providing penalties for violations of the provisions of this act" were not contrary to and in violation of the implied provision of the Constitution of the United States that the government of the several states shall be representative in form and that the several states shall create and maintain representative legislative assemblies.

Fifth. The Supreme Court of the State of Oregon erred in holding and deciding that said pretended Initiative and Referendum amendment was not contrary to and in violation of an act of Congress of February 14, 1859, admitting Oregon to the Union, the preamble of which is here quoted:

"Whereas, the people of Oregon have formed, ratified and
82 adopted a constitution of state government which is republican in form, and in conformity with the constitution of the United States, and have applied for admission into the Union on an equal footing with the other states; therefore,

"That, Oregon be, and she is hereby, received into the Union on an equal footing with the other states in all respects whatever, with the following boundaries:"

And by reason of the foregoing errors and holdings, the appellant and plaintiff in error prays that the said judgment may be reversed and that a mandate be issued directing that a decree be entered in favor of the appellant and plaintiff in error and for costs and dis-

bursements, and that it may be restored to all things which it h lost by reason of said judgment.

E. S. PILLSBURY,
CAREY & KERR,
HARRISON ALLEN,
Attorneys for Appellants and Plaintiff in Error.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

(Endorsed:) In the Supreme Court of the State of Oregon. Pacif States Telephone & Telegraph Company, plaintiff & Appellant, v State of Oregon, defendant & Respondent. Assignment of error Filed April 5, 1909, J. C. Moreland, Clerk. E. S. Pillsbury, Care & Kerr, Harrison Allen, attorneys for appellant.

83 In the Supreme Court of the State of Oregon.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,
vs.
STATE OF OREGON, Respondent.

Petition for Writ of Error.

Comes now the above Pacific States Telephone and Telegrap Company, appellant, and shows: That heretofore and on the 2n day of February, 1909, a judgment was entered by the above name Supreme Court of the State of Oregon against your petitioner affirm ing the judgment and decree of the Circuit Court of the State o Oregon for Multnomah county in favor of the above named respond ent and defendant and against the above named appellant, as wi appear by the record and proceedings in the said cause, in whic decree and decision and the proceedings had prior thereto in thi cause certain errors were committed to the prejudice of the plainti and appellant, all of which will, in more detail, appear from the a signment of errors, which is filed with this petition.

Wherefore this plaintiff and appellant prays that a writ of erro issue in this behalf returnable in the Supreme Court of the Unite States for the correction of the errors complained of, and that a dul authenticated transcript of the record and proceedings in this cas may be sent to the Supreme Court of the United States.

E. S. PILLSBURY,
CAREY & KERR,
HARRISON ALLEN,
Attorneys for Petitioners.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

84 STATE OF OREGON,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the Pacific States Telephone and Telegraph Company to the State of Oregon, in the sum of Twelve thousand Dollars; said bond, when approved, to act as a supersedeas.

Dated April 3d, 1909.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

85 [Endorsed:] No. —. In the Supreme Court of the State of Oregon. Pacific States Telephone and Telegraph Company, Plaintiff and Appellant, *vs.* State of Oregon Defendant and Respondent. Petition for Writ of Error. Filed April 5, 1909. J. C. Moreland, Clerk. By —— ——, Deputy. E. S. Pillsbury, Carey & Kerr, Harrison Allen, Attorneys for Appellant.

86 In the Supreme Court of the United States.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff in Error,

vs.

STATE OF OREGON, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents that the Pacific States Telephone and Telegraph Company, a corporation, organized and existing under the laws of the State of Oregon as principal, and the National Surety Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its principal place of business at 115 Broadway in the City of New York, duly authorized to act as sole surety in the courts of the State of Oregon and of the United States, as surety, are held and firmly bound unto the above named State of Oregon in the sum of Twelve Thousand Dollars ($12,000.00) to be paid to it, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our, and each of our heirs, executors, administrators, representatives, successors and assigns firmly by these presents.

Sealed with our seals this 3rd day of April, 1909.

Whereas the above named plaintiff in error seeks to prosecute its Writ of Error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the said Supreme Court of the State of Oregon:

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute such Writ of Error to effect and answer all costs and damages that may be adjudged if

it shall fail to make good its plea, then this obligation shall be void, otherwise to be and remain in full force and effect.

87 PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY,
By W. J. PHILLIPS,
Division Commercial Superintendent.
CAREY & KERR, *Its Attorneys.*
NATIONAL SURETY COMPANY,
By JAS. McI. WOOD,
J. COUCH FLANDERS,
Its Attorney in Fact.

Attest:
[SEAL.] JAS. McI. WOOD,
Resident Assistant Secretary.

The above bond is approved this 3d day of April, 1909.
FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

(Endorsed:) In the Supreme Court of the United States. Pacific States Telephone Company, plaintiff in error, *vs.* State of Oregon Defendant in error. Bond on writ of error from the Supreme Court of Oregon. Filed Apr. 5, 1909, J. C. Moreland, Clerk.

88 In the Supreme Court of the United States.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff in Error,
vs.
STATE OF OREGON, Defendant in Error.

Writ of Error.

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oregon, before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said action between the State of Oregon, plaintiff and defendant in error, and the Pacific States Telephone and Telegraph Company, a corporation, defendant and plaintiff in error, wherein was drawn in question the validity of an amendment to the constitution of the State of Oregon, or statutes of, or an authority exercised under said state, on the ground of their being repugnant to the Constitution, or laws of the United States, and the decision was in favor of their validity, and was against the title, right, privileges or exemption specially set up or claimed under such clause of the constitution or statutes of the United States, and the title, right, privilege or ex-

emption specially set up or claimed under such sections of the constitution, statutes or commission; a manifest error hath happened to the great damage of the said Pacific States Telephone and Telegraph Company, as by its complaint appears;

89 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 4th day of June next, in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 5th day of April A. D. 1909.

[Seal United States Circuit Court, Oregon.]

G. H. MARSH,
Clerk of the Circuit Court of the United States
for the District of Oregon.
By G. W. MARSH, *Deputy.*

Allowed:

FRANK A. MOORE,
Chief Justice of the Supreme Court
of the State of Oregon.

90 [Endorsed:] No. —. In the Supreme Court of the United States. Pacific States Telephone and Telegraph Co., Plaintiff in Error, *vs.* State of Oregon, Defendant in Error. Writ of Error. Filed April 5, 1909. J. C. Moreland, Clerk Supreme Court State of Oregon. E. S. Pillsbury, Carey & Kerr, Harrison Allen, Attorneys for Defendant and Appellant.

91 UNITED STATES OF AMERICA, *ss:*

The President of the United States to State of Oregon, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Oregon, wherein Pacific States Telephone and Telegraph Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Oregon this 5th day of April, 1909.

FRANK A. MOORE,
Chief Justice of the Supreme Court of the State of Oregon.

Attest:
J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

SALEM, OREGON, *April* 5, 1909.

I, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

A. M. CRAWFORD,
Attorney General for the State of Oregon, Attorney for said State.

92 [Endorsed:] No. —. In the Supreme Court of the United States. Pacific States Telephone and Telegraph Company, Plaintiff in Error, *vs.* State of Oregon, Defendant in Error. Citation. Filed April 5, 1909. J. C. Moreland, Clerk Supreme Court State of Oregon. E. S. Pillsbury, Carey & Kerr, Harrison ——, Attorneys for Appellant.

93 STATE OF OREGON,
County of Marion, ss:

I, J. C. Moreland, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing transcript is a full, true and complete copy of the record of said action certified to and filed with our said court, as the transcript on appeal from the judgment of the circuit court of the State of Oregon for the County of Multnomah, from which said appeal was taken, and is a copy of the Abstract of the record upon which said appeal was heard, and the judgment of our supreme court entered thereon on the 2nd day of February 1909.

I further certify that the foregoing transcript likewise contains a full, true and correct copy of the opinion filed, and upon which said judgment of our said supreme court was entered on the 2nd day of February, 1909.

I further certify that the Assignment of Errors and Prayer for Reversal, Bond on Appeal and its Approval, all of which are attached to the above and foregoing, have been by me compared with the originals thereof, and that they are true and correct copies of such originals as the same appear of record and on file in my office and in my custody.

I further certify that the Petition for Writ of Error and Allowance thereof, Writ of Error and allowance thereof, and Citation with service endorsed thereon, all of which are attached to the foregoing, are the original Petition for Writ of Error, Writ of Error,

and Citation lodged with and filed in my office, and that the foregoing transcript is a true and correct copy of the papers and pleadings filed and of the proceedings had in the above entitled cause in our said court as the same appears of record and on file in my office.

94 I further certify that the cost of the foregoing return to Writ of Error is $25.00 and that said amount was paid by Messrs. Carey & Kerr, Attorneys for the plaintiff in error.

In witness whereof, I have hereunto set my hand and the seal of the Supreme Court of the State of Oregon, at my office in the City of Salem, in said state, this 12th day of April 1909.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

95 UNITED STATES OF AMERICA,
Supreme Court of Oregon, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the City of Salem, this 12th day of April, 1909.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

Endorsed on cover: File No. 21,618. Oregon supreme court. Term No. 822. Pacific States Telephone and Telegraph Company, plaintiff in error, *vs.* The State of Oregon. Filed April 21st, 1909. File No. 21,618.

5

FILED.
OCT 3 1911
JAMES H. McKENNEY,
CLERK.

In the Supreme Court

OF THE

United States

OCTOBER TERM, [redacted] 1911

[redacted]

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY (a corporation),
Plaintiff in Error,

vs.

STATE OF OREGON,
Defendant in Error.

No. 36.

BRIEF FOR PLAINTIFF IN ERROR.

E. S. PILLSBURY,
OSCAR SUTRO,
Attorneys for Plaintiff in Error.

CAREY & KERR,
PILLSBURY, MADISON & SUTRO,
Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1908

No. 822

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY (a corporation),
Plaintiff in Error,

vs.

STATE OF OREGON,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is an action brought by the State of Oregon, the defendant in error here, against the Pacific States Telephone and Telegraph Company, the plaintiff in error, a corporation formed under the laws of Oregon for the purpose of doing a telegraph and telephone business in that State and other States and Territories of the Pacific Coast, to recover a license tax on gross earnings,

claimed to have accrued for the period beginning Jun 26, 1906, and ending December 31, 1906.

The demand is for $10,450.66, alleged in the complain to be due under

> "an initiative law requiring express, telephone an telegraph companies to pay a license upon thei gross receipts, passed by a vote of the people Jun 4, 1906, and promulgated by proclamation of th Governor dated June 25, 1906, and published a Chapter One of the Laws of 1907." (Rec. p. 2.)

The defendant answered, denying liability on th ground that the said "Initiative Act", which was passe pursuant to the amendment of Section 1 of Article I of the Constitution of Oregon, providing for the initia tive and referendum, and under which the license ta was levied, is invalid because repugnant:

1. To the provisions of Article I, Section 2, Sectio 3, Section 4 and Section 8; Article II, Section 1; Articl IV, Section 3 and Section 4; Article V; Article VI, an to the 14th Amendment, Section 1, of the Constitution o the United States;

2. To the Act of Congress of February 14, 185 admitting the State of Oregon to the Union;

3. To the Act of Congress, approved June 1, 187 (1 Stat., At Large, 23, Rev. Stat., U. S., Section 1836).

Other grounds of objection to the Act, set forth i paragraphs 24, 25, 26 and 27 of the answer and arisin under the U. S. Postal Act, approved July 24, 1866 were stricken out on application of the defendant (Rec pp. 14-15-24) and are not to be considered; nor ar

certain other defenses pleaded in the answer and arising under the Constitution and Acts of the Legislature of Oregon relating to the taxation of real and personal property.

The plaintiff demurred to each of the remaining defenses by answer, on the ground that it did not constitute a defense to the cause of action stated in the complaint. The demurrer was sustained and judgment rendered as prayed for by the plaintiff.

Defendant appealed to the Supreme Court of Oregon and assigned as grounds of error, on such appeal, the failure of the lower Court to sustain each and all the defenses set up in the answer (Rec. pp. 25-32).

The Supreme Court of Oregon affirmed this judgment (Rec. pp. 34-37), 53 Or. 163 (99 Pacific 427), and the case comes to this Court on Writ of Error and upon an Assignment of Errors similar to all those urged in the Supreme Court of Oregon as to federal questions (Rec. pp. 37-40), and which are, in substance, that the "initiative" amendment of June 2, 1902, to the Constitution of Oregon, the Act of the Legislature of Oregon, approved February 24, 1903, to make this amendment effective, and the license tax measure under which this action was brought, passed by a vote of the people June 14, 1906, upon initiative petition pursuant to said amendment and Act of 1903, are invalid because they violate the Federal Constitution and the Acts of Congress invoked by the answer and specified in the said assignment of errors to this Court.

It follows that the real issue presented here is t
validity of the "initiative" amendment of June 2, 19
to the Constitution of Oregon and upon which depe
for their force the Act of 1903 of the Legislature
Oregon, making effective this initiative amendment, a
the license tax measure passed by a vote of the peo
of Oregon June 4, 1906, upon initiative petition pu
suant to said amendment and to the Act of 1903, a
which measure is the basis of the plaintiff's claim.

Before entering upon the argument, we quote, f
convenience, some constitutional provisions and statut
mentioned in the Assignment of Errors, and which w
be considered and referred to herein.

CONSTITUTION AND STATUTES OF OREGON.

Art. I, Sec. 21, Constitution:

> "No ex post facto law, or law impairing the ob
> gations of contracts, shall ever be passed, nor sh
> any law be passed, the taking effect of which sh
> be made to depend upon any authority, except
> provided in this constitution: provided, that la
> locating the capital of the state, locating coun
> seats, and submitting town and corporate acts, a
> other local and special laws, may take effect or n
> upon a vote of the electors interested."

Art. I, Sec. 32:

> "No tax or duty shall be imposed without the co
> sent of the people or their representatives in t
> legislative assembly; and all taxation shall be equ
> and uniform."

Art. III, Sec. 1:

> "The powers of the government shall be divid
> into three separate departments—the legislative, t

executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided."

Art. IV, Sec. 1 (prior to its amendment):

"The legislative authority of the state shall be vested in the legislative assembly, which shall consist of a senate and house of representatives. The style of every bill shall be 'Be it enacted by the Legislative Assembly of the State of Oregon', and no law shall be enacted, except by bill."

Art. IV, Sec. 1 (subsequent to its amendment in 1902):

"The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety) either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final

adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: 'Be it enacted by the people of the State of Oregon.' This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for justice of the supreme court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be specially provided therefor."

Act, approved February 24, 1903 (Rec. 17 to 22).

The Act of the Legislature of Oregon, approved February 24, 1903, to make the initiative amendment effective (Rec. pp. 17-22), provides, by Section 2, for the form of an initiative petition, to be addressed to the Secretary of State by any legal voters, demanding that a proposed law or amendment to the Constitution be submitted for approval or rejection at a designated general election, and by which petition each signer is required to make this statement only:

"I have personally signed this petition, and my residence, postoffice and voting precinct are correctly written after my name."

By Section 3, the county clerk of each county in which such a petition may be signed, shall compare the signatures of the electors so signing with their signatures on the registration books and certify as to their genuineness, and his certificate shall be *prima facie* evidence of the facts therein stated.

By Section 4, when the petition is filed with him, the Secretary of State shall decide, in the first instance, whether it be regular, and an appeal lies to the Supreme Court of the State from his decision in this respect.

Section 5 provides that immediately upon the filing of any such petition, as described, the Secretary of State shall notify the Governer, who shall, forthwith, issue his proclamation announcing that it has been filed, *with a brief statement of its tenor and effect,* and the same shall be published four times in four consecutive weeks in one daily or weekly newspaper in each judicial district of the State.

Section 6 requires the Secretary of State, at the time he furnishes the several county clerks with copies of the names of the candidates for State and district offices, to also furnish his certified copy of the titles and numbers of the various measures to be voted on at the ensuing general election, using for each constitutional amendment, or initiative or referendum act, a title designated for that purpose by the legislative assembly, committee, or organization filing the same, but such title shall in

no case *exceed twenty words,* nor resemble any such title previously filed for any such measure to be submitted at that election; and such titles shall be numbered and printed on the official ballot in the order the measures are filed.

Section 7 provides the manner of voting upon measures submitted to the people and declares that no such measure shall be adopted unless it receives a majority of the total number of effective votes cast thereon.

Section 8 of said Act reads as follows:

> "The Secretary of State shall, not later than the first Monday of the third month next before any general election at which any proposed law or amendment to the constitution is to be submitted to the people, cause to be printed a true copy of the title and text of each measure to be submitted, with the number and form in which the question will be printed on the official ballot. The paper to be used for the covers of such pamphlets shall be twenty by twenty-five inches, and fifty pounds weight to the ream. The persons, committees, or duly authorized officers of any organization filing any petition for the initiative, *but no other person or organization,* shall have the right to place with the Secretary of State for distribution, any pamphlets advocating such measure, not later than the first Monday of the fifth month before the regular general election at which the measure is to be voted on; any person, committee, or organization opposing any measure may place with the Secretary of State for distribution any pamphlets they may desire, not later than the first Monday of the fourth month immediately preceding such election; as to pamphlets advocating or opposing any measure referred to the people by the legislative assembly, they shall be governed by the same rules of time, but they may be placed with the Sec-

retary of State by any person, committee, or organization: Provided, that all such pamphlets shall be furnished to the Secretary of State in sheets of uniform size, as follows: Size of pamphlet page to be six inches wide by nine inches long; size of type page to be twenty-six ems pica wide by forty ems pica long, set in long primer or ten-point type, and printed on sized and supercalendered paper, twenty-five by thirty-eight inches, weighing fifty pounds to the ream. All such pamphlets shall be furnished to the Secretary of State *at the sole expense of the persons interested,* and without cost to the State. In no case shall the Secretary of State be obliged to receive any such pamphlets unless a sufficient number is furnished to supply *one to every legal voter in the State,* but in such case, he shall forthwith notify the persons offering the same of the number required. The Secretary of State shall cause *one copy of each of said pamphlets* to be bound in with his copy of the measures to be submitted as herein provided. The title page of every such pamphlet shall show the official numbers for and against, and the ballot title of the measure to which it refers, and whether it is intended to favor or oppose such measure, and by whom it is issued. The Secretary of State shall distribute to each county clerk, before the second Monday in the third month next preceding such regular general election, a sufficient number of said bound pamphlets to furnish one copy to every voter in his county. Every registration officer, after the receipt by the county clerk of such pamphlets, shall deliver to every voter thereafter as he is registered, one copy of the same, and said registration and delivery shall be a part of the official duty of every officer who registers voters, and his registration fee or wages shall be full compensation for this additional service. The Secretary of State shall not be obliged to receive or distribute any pamphlets advocating or opposing any measure unless the same shall be filed with him within the time herein provided." (Italics ours.)

CONSTITUTION AND STATUTES OF THE UNITED STATES.

Art. I, Sec. 2, Clause 1, Constitution:

"The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

Art. I, Sec. 3:

"The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote."

Art. I, Sec. 4:

"The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof."

Art. I, Sec. 8, Clause 17:

"The Congress shall have power * * * To exercise exclusive legislation * * * over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

Art. II, Sec. 1, Clause 2:

"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress."

Art. IV, Sec. 3:

"New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or

more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress."

Art. IV, Sec. 4:

"The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence."

Art. V:

"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."

Art. VI:

"This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

"The senators and representatives before mentioned and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution, but no religious test shall ever be re-

quired as a qualification to any office or public trust under the United States."

XIV Amendment, Sec. 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Preamble, Act of Congress, February 14, 1859, admitting Oregon to the Union:

"Whereas, the people of Oregon have formed, ratified and adopted a constitution of state government which is republican in form, and in conformity with the constitution of the United States, and have applied for admission into the Union on an equal footing with the other states; therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

"That Oregon be, and she is hereby, received into the Union on an equal footing with the other states in all respects whatever, with the following boundaries, etc."

The Act of Congress, approved June 1, 1789, providing the form of oath or affirmation to support the Constitution of the United States to be administered to the members of the several State Legislatures and to all executive and judicial officers of the States.

(1 Stat. at Large, 23, Rev. Stat., U. S., Section 1836.)

Brief.

THE LICENSE TAX MEASURE IS VOID BECAUSE THE OREGON CONSTITUTIONAL AMENDMENT UNDER WHICH IT WAS "ENACTED" BY THE DIRECT VOTE OF THE PEOPLE, IS REPUGNANT TO THE FEDERAL CONSTITUTION.

PRELIMINARY.

The attack upon the validity of this measure involves the vital question whether or not the Government of a State may be directly administered by a numerical majority of its voters—or even possibly, by a minority.

The issue requires the Court to find whether under the Federal Constitution the whole people of an integral part of the Union may be ruled by force of numbers. It is not the question of mere majority rule which is at stake, for that principle involves the creation from *all* the people of a majority, to the rule of which *all* submit. What the initiative offers is government by the greatest number, in the determination of which the minority has, in reality, no part.

The basis of our institutions is that the people shall select those who perform the functions of government. In this selection each member of the commonwealth has a voice. The chosen administrators of the powers of government are no less the representatives of the whole people than of a part.

But under the principle of direct legislation, it is a numerical preponderance of voters which enacts the law for the whole. The voice of the minority is not heard in the preparation or enactment of such legislation. It is true that they may vote, but if outnumbered

their votes are of no value. They may argue but no one need listen.

The distinction was well stated by John Stuart Mill in his treatise on "Representative Government". At page 132 the learned author said:

> "The pure idea of democracy, according to its definition, is the government of the whole people by the whole people, equally represented. Democracy as commonly conceived and hitherto practiced, is the government of the whole people by a mere majority of the people, exclusively represented. The former is synonymous with the equality of all citizens; the latter, strangely confounded with it, is a government of privilege, in favor of the numerical majority, who alone possesses practically any voice in the State. This is the inevitable consequence of the manner in which the votes are now taken, to the complete disfranchisement of minorities.
>
> "The confusion of ideas here is great, but it is so easily cleared up, that one would suppose the slightest indication would be sufficient to place the matter in its true light before any mind of average intelligence. It would be so, but for the power of habit, owing to which the simplest idea, if unfamiliar, has as great difficulty in making its way to the mind as a far more complicated one. That the minority must yield to the majority, the smaller number to the greater, is a familiar idea; and accordingly men think there is no necessity for using their minds any further, and it does not occur to them that there is any medium between allowing the smaller number to be equally powerful with the greater, and blotting out the smaller number altogether. In a representative body actually deliberating, the minority must, of course, be overruled; and in equal democracy (since the opinions of the constituents, when they insist on them, determine those of the representative body) the majority of

the people, through their representatives, will outvote and prevail over the minority and their representatives. But does it follow that the minority should have no representatives at all? Because the majority ought to prevail over the minority, must the majority have all the votes, the minority none? Is it necessary that the minority should not even be heard? Nothing but habit and old association can reconcile any reasonable being to the needless injustice. In a really equal democracy, every or any section would be represented, not disproportionately but proportionately. A majority of the electors would always have a majority of the representatives; but a minority of the electors would always have a minority of the representatives. Man for man, they would be as fully represented as the majority. Unless they are, there is not equal government, but a government of inequality and privilege; one part of the people rule over the rest; there is a part whose fair and equal share of influence in the representation is withheld from them; contrary to all just government, but above all, contrary to the principles of democracy, which professes equality as its very root and foundation."

The same idea was expressed by Hamilton in the New York federal convention, using these words:

"Give all power to the many they oppress the few. Give all power to the few they will oppress the many. Both, therefore, ought to have the power that each may defend itself against the other."

Elliott's Debates, Vol. V, p. 203.

"We have passed from a mere democracy to a government of laws. We have surrendered the control of majorities to the domination of an agreement, by which all matters of state are to be determined. This agreement was not entered into for the purpose of protecting majorities, for they can

take care of themselves, but for the purpose of protecting minorities, even down to the least worthy citizen of the commonwealth."

Johnson "Free Government", p. 42.

And see, also,

De Tocqueville's "Democracy in America", Chap. XV,

where the great French publicist predicted that in unlimited authority of the majority lay the germ of the destruction of the free institutions of America.

In "Democracy and Empire" Franklin Henry Giddings, speaking of the maxim that a Government derives its power from the consent of the governed, shows that by "government" we can not mean the will of a majority; that by "justice" we can not mean the execution of such laws as the majority chooses to enact. The learned writer points out that if such were the true meaning of the maxim, governments so established could not be said to "exercise unjust powers when a majority coerces a minority".

It would mean, he says, that

"practically the test of moral government is nothing more than mere approval by human numbers".

Respecting such an interpretation he proceeds to show that

"in the ordinary exercise of its functions, a government must respect the rational convictions and the moral rights of all its subjects, whether—on questions of mere expediency—they be counted with a minority or with a majority. That this is a true

proposition, we have proof in the vast amount of attention with which, in our constitutional law, protection has been given to the rights of minorities, and even of individuals. The very limitation of the powers of governments, the positive prohibitions of certain forms of governments, the insistence upon a two-thirds or a three-fourths vote in the decision of various fundamental matters—all these are admissions that, in the performance of its functions, a government to the utmost possible extent should look for and secure the consent of the governed, even when the governed are in a helpless minority."

"Democracy and Empire", pp. 260-266.

In legislative assemblies the minority rarely, if ever, fails to moderate the wishes of the majority, however powerful. Reason and persuasion have their opportunity. But government by direct legislation is government by brute force. It is our contention that in this country laws cannot be so made.

"Law is something more than mere will exerted as an act of power", said this Court in *Hurtado v. California*, 110 U. S. 535. In the despotism of a monarch or of a mob this may not be true. But the Court was speaking of the laws of republics and of this country. In small communities direct legislation is not inconsistent with the opportunity for the whole people to be heard in the enactment of laws. But in the States of the Union, covering as they do vast areas, and containing millions of inhabitants, the privilege of popular assemblage for deliberation upon State matters would be a travesty upon the right of representation.

The result can only be that, without discussion, without the exchange of ideas or the enlightenment of argument, each voter, likely without even an understanding of the necessities or wishes of his neighbor, casts his vote and only force of numbers prevails, untempered perchance by reason or knowledge. It has been said that "law making includes the science of ethical compromises". The initiative puts an end to this theory of legislation.

Representation is the cardinal principle upon which rest our institutions. Tucker (Constitution of the U. S.) says:

> "Representation is the modern method by which the will of a great multitude may express itself through an elected body of men for deliberation in law making. It is the only practicable way by which a large country can give expression to its will in *deliberate legislation.*" (p. 87.)

Thomas Jefferson, one of the greatest exponents of democracy among the early statesmen of the country, recognized that the *republican form* of government, as developed in Virginia, Rhode Island, New York, New Jersey, Pennsylvania and other colonies, and which was adopted by the original States and carried into the Constitution of the United States, is essentially representative. Upon this subject he is thus recorded:

> "The equal rights of man and the happiness of every individual are now acknowledged to be the only legitimate objects of government. Modern times have the signal advantage too, of having discovered the only device by which these rights can be secured, to-wit: government by the people acting

not in person, but by representatives chosen by themselves."

Jefferson's Writings, Vol. 15, p. 482.

Also, at p. 452 of the same volume, as follows:

"You and I may differ occasionally in details of minor consequence, as no two minds, more than two faces, are the same in every feature. But our general objects are the same, to preserve the republican form and principles of our Constitution and cleave to the salutary distribution of powers which that has established. These are the two sheet anchors of our Union. If driven from either we shall be in danger of foundering."

And again he writes:

"A government is republican in proportion as every member comprising it has his equal voice in directing its concerns—not indeed in person, which would be impracticable beyond the limits of a city or small township, but by representatives chosen by himself and responsible to him at short periods."

In brief, a representative constitutional democracy.

Dr. Woodrow Wilson, in his very valuable book on "Constitutional Government in the United States", says (p. 191):

"A government must have organs; it cannot act inorganically, by masses. It must have a law-making body; it can no more make law through its voters than it can make law through its newspapers."

And commenting upon the only manner in which legislation can properly be accomplished, this learned author in the same work says further (pp. 104-5):

> "Common counsel is not aggregate counsel. It is not a sum in addition, counting heads. It is compounded out of many views in actual contact; is a living thing made out of the vital substance of many minds, many personalities, many experiences; and it can be made up only by the vital contacts of actual conference, only in face to face debate, only by word of mouth and the direct clash of mind with mind."

Professor Garner in his work "Introduction to Political Science", differentiates a pure democracy, such as the initiative would lead to, and a representative democracy, which is the republican form of government contemplated by the Federal Constitution, in this language:

> "Democracies are of two kinds—pure, or direct, and representative, or indirect. A pure democracy is one in which the will of the state is formulated and expressed directly and immediately through the people acting in their primary capacity. A representative democracy is one in which the state will is ascertained and expressed through the agency of a small and select number, who act as the representatives of the people. A pure democracy is practicable only in small states, where the voting population may be assembled for purposes of legislation and where the collective needs of the people are few and simple. In large and complex societies, where the legislative wants of the people are numerous, the very necessities of the situation make government by the whole body of citizens a physical impossibility."

And Hamilton, writing upon the same subject, says in the Federalist:

> "The difference most relied upon between the American and other republics consists in the prin-

ciple of representation; which is the pivot on which the former moves, and which is supposed to be unknown to the latter, or, at least, to the ancient part of them."

The right of every man to be heard in his own defense, in the defense of his life, liberty and property, is guaranteed by the Government of this country. Due process of law rests upon the law of notice to every man before he is deprived of any of the personal rights which are essential to the pursuit of happiness. But notice is but an idle form if with it goes not the right to be heard.

That this right is fundamental will not be gainsaid. It has been often recognized that legislation is the highest function of government. The effect of direct legislation is that in this department of government numbers alone will prevail, and a hearing by representation will be denied to the minority in the State. Such is not our system. The majority rules in the selection of representatives, but these represent *the whole people.*

The great significance of the question must be apparent. That it strikes at the foundations of our Government is certain. No republic can safely harbor tyranny. No tyranny is worse than that of an absolute majority. Bouvier calls it ochlocracy:

> "Government where the authority is in the hands of the multitude—the abuse of a democracy."

> "The trusteeship in the representative government is the only means yet discovered to temper the rashness of the democracy and overcome the obstinacy of monarchs."

> *Francis Lieber, "Civil Liberty and Self Government"*, Vol. I, p. 185.

The Rt. Hon. James Bryce, in speaking of the "tyranny of the majority" as any abuse by the majority of the powers which it enjoys in free countries under and through the law, says this

> "tyranny consists in the wanton or inequitable use of strength by the stronger, in the use of it to do things which one equal would not attempt against another. A majority is tyrannical when it *decides without hearing the minority,* when it suppresses fair and temperate criticism on its own acts, when it insists on restraining men in matters where restraint is not required by the common interest, when it forces men to contribute money to objects which they disapprove, and which the common interest does not demand." (Italics ours.)
>
> *Bryce's American Commonwealth,* Vol. II, p. 335 (3rd Ed.)

And the same eminent author and statesman declared the remedy for such tyranny to lie in this Court, which he denominated:

> "The living voice of the Constitution—that is, of the will of the people expressed in the fundamental law they have enacted. It is, therefore, as some one has said, the conscience of the people, who have resolved to restrain themselves from hasty or unjust action by placing their representatives under the restriction of a permanent law. It is the guarantee of the minority, who, when threatened by the impatient vehemence of a majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction."
>
> Vol. I, pp. 272-3 (3rd Ed.).

The Federal Constitution aims to guarantee to every citizen of the United States, representation in government and the protection of a republican form of rule. The irresponsible despotism of the multitude has no place in our polity.

In *Hurtado v. California* (supra) Mr. Justice Matthews said:

> "Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." (p. 536.)

In the republic these limitations bind all of the people as well as the Governments created by them. Each citizen of the commonwealth is entitled, as against all, to the enjoyment of those rights which are guaranteed to him by a republican form of government.

In *Luther v. Borden,* 7 How. pp. 29-30, Daniel Webster, speaking to the question of representative government, is reported to have said:

> "Let me state what I understand these principles to be. The first is, that the people are the source

of all political power. Everyone believes this. Where else is there any power? There is no hereditary legislature; no large property; no throne; no primogeniture. Everybody may buy and sell. There is an equity of rights. Anyone who should look to any other source of power than the people would be as much out of his mind as Don Quixote, who imagined that he saw things which did not exist. Let us all admit that the people are sovereign. Jay said that in this country there were many sovereigns and no subject. A portion of this sovereign power has been delegated to government, which represents and speaks the will of the people as far as they choose to delegate their power. Congress have not all. The State governments have not all. The Constitution of the United States does not speak of the government. It says the United States. Nor does it speak of State governments. It says the States, but it recognizes governments as existing. The people must have representatives. In England the representative system originated not as a matter of right, but because it was called by the King. The people complained sometimes that they had to send up burgesses. At last there grew up a constitutional representation of the people. In our system it grew up differently. It was because the people could not act in mass, and the right to choose a representative is every man's portion of sovereign power. Suffrage is a delegation of political power to some individual. Hence the right must be guarded and protected against force or fraud. That is one principle. Another is that the qualification which entitles a man to vote must be prescribed by previous laws directing how it is to be exercised, and also that the results shall be certified to some central power so that the vote may tell. We know no other principle. If you go beyond these, you go wide of the American track. One principle is that the people often limit their government; another, that they often limit themselves. They secure themselves against sudden changes by mere majorities."

And the late Chief Justice Fuller, delivering the opinion of this Court *In re Duncan,* 139 U. S. 449, after stating that:

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities",

refers to *Luther v. Borden,* and says:

> "Mr. Webster's argument in that case took a wider sweep, and contained a masterly statement of the American system of government, as recognizing that the people are the source of all political power, but that as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule; that through its regulated exercise each man's power tells in the constitution of the government and in the enactment of laws; that the people limit themselves in regard to the qualifications of electors and the qualifications of the elected, and to certain forms for the conduct of elections; that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes; and that the con-

> stitution and laws do not proceed on the ground of revolution or any right of revolution, but on the idea of results achieved by orderly action under the authority of existing governments, proceedings outside of which are not contemplated by our institutions." (pp. 461-2.)

And while it might be urged that, upon principle, the referendum is also obnoxious to the legislative function under a republican form of government, as impairing the responsibilities and duties of the Legislature, we are not required to discuss its scope and limitations in this case. One important difference between the referendum and the initiative is that the latter is possible only under the purest form of democracy, while the former may be used in a Government having *some* of the features of a republic. Cooley noted the distinction. He said:

> "*It is obviously impossible* that any considerable people should in general meeting consider, mature and adopt their own laws; but when a law has been perfected and it is deemed desirable to take expression of public sentiment upon it, or upon any other single question, the ordinary machinery of elections is adequate to the end and the expression is easily and without confusion obtained by submitting such law, or such question, for affirmative or negative vote."
>
> Constitutional Limitations, p. 896 (7th Ed.).

The issue here presented is, whether a State may, by amendment of its Constitution, provide for general legislation by the people without the intervention of representatives or a legislative assembly.

We are aware that the initiative method of legislation is claimed to be a check against corruption of legislators and misrepresentation of the people by their legislative assemblies; a panacea for the cure of those evils which accompany all representative government.

But in the government of the republic the end will not be the justification for the means. It were better that the struggle against abuse and corruption should continue than that they should be eradicated by theories and practices of government revolutionary in character and founded on error or injustice. And it would be difficult to discover how a community like that of Adams County, Ohio, could be benefited by the right of initiative legislation, though it might, perhaps, by the power to recall judges in some emergencies.

Direct legislation may be in accord with the wishes of the vast majority of one or several of the States. But that will not suffice to make it lawful. If it has no place in the organization of our Government, if its enforcement is a violation of the Constitution of the United States, the Courts must so declare, however great or small its popularity.

Finally, it may be observed that the supremacy of the Federal Constitution is invaded equally whether the Act be one that is hostile to the rights of persons claiming the protection of the laws or Constitution of the United States, or hostile to the organization or maintenance of the Federal Government. It is the conten-

tion here that initiative legislation is invalid on both grounds.

Government by direct legislation violates the express guaranty by the United States that in each State there shall be a republican form of government (Const. U. S., Art. IV, Sec. 4); it also violates the obligation of each State of the Union to maintain a republican form of government and the institutions which are inseparable from it, such as a representative Legislature, an executive and a judiciary. Such legislation also denies to a resident of a State, where it obtains, the equal protection of the laws and due process of law, as guaranteed by the 14th Amendment.

It is true that the relation of Federal to State authorities rests on the doctrine of expressed grant to the national government and reserved powers to the State. But the creation of the Union and the surrender of the powers necessary for the maintenance and operation of the Federal Government carried with them an acceptance of fundamental restrictions upon the forms of government which the States might adopt. Each State became limited to the adoption of principles of government consistent with the maintenance of the Union, with the existence of the national institutions, and with the exercise of the constitutional federal power.

By the initiative method the legislative branch of a State Government, designed to be equal in importance to the executive or judicial, is greatly lessened in efficiency,

the whole system as originally designed, is impaired and the equilibrium between these departments destroyed. One branch cannot be crippled without putting the whole structure in jeopardy.

The Constitution of Oregon, Art. III, Sec. 1 (ante), provides for three separate departments of government—legislative, executive and judicial—and declares that no person *charged with official duties under one,* shall exercise *any of the functions of another,* "except as in this Constitution expressly provided". Under the initiative amendment to that Constitution, a Governor or a Judge of the Supreme Court—any executive or judicial officer of the State—becomes a legislator if he votes for a law, as he can do under that amendment, and so exercises the legislative function. He might also propose laws. This illustrates how the three departments of government may thus become blended.

The extent to which initiative legislation, as it is now practiced in Oregon, subverts the principles of our Government is also illustrated by the practical elimination now taking place in that State, of the difference between statute law and constitutional provisions. Thus at the election of 1910 eleven constitutional amendments were submitted to the voters. It becomes apparent that one of the fundamental principles of our Government, namely, that a Constitution—in the nature of a bill of rights under which the people restrict themselves as to individual privileges for

the benefit of the mass—is a security for the stability of government, is likely to be overturned; for the Constitution of Oregon, under the initiative plan, may be changed as readily and frequently as the statutes, and by minorities of all the voters, because it is optional with the author of any initiative measure to determine whether it shall be presented as an amendment to the Constitution or a statutory enactment; the only practical difference being that the Legislature may repeal an objectionable statute, but a bad Constitutional amendment remains operative in any event until the next general election when, through the initiative, it may be abrogated by a majority of those voting upon that question.

Dr. Woodrow Wilson, in his scholarly work "The State", in criticising the tendency to adopt provisions in State Constitutions which are statutory in character, says:

> "The objections to the practice are as obvious as they are weighty. General outlines of organization, such as the Constitution of the United States contains, may be made to stand without essential alteration for long periods together; but in proportion, as constitutions make provisions for interests whose aspects must change from time to time with changing circumstances, they enter the domain of such law as must be subject to constant modification and adaptation. Not only must the distinctions between constitutional and ordinary law, hitherto recognized and valued, tend to be fatally obscured, but the much-to-be desired stability of constitutional provisions must in great part be sacrificed. Those constitutions which contain the lar-

> gest amount of extraneous matter, which does not concern at all the structure or functions of government, but only private or particular interests, must, of course, however carefully drawn, prove subject to most frequent change. In some of our States, accordingly, constitutions have been as often changed as important statutes. The danger is that constitution making will become with us only a cumbrous mode of legislation." (p. 475.)

It is an historical fact that the framers of the Constitution of the United States recognized that temporary expressions of the will of the people are often changed upon maturer consideration and that the fullest deliberation should attend all ultimate popular decisions; and the Constitution was framed to secure that result. It was their purpose that this great instrument should be changed for the gravest reasons only and after the most mature deliberation. The same considerations apply to State Constitutions.

The recall of judges and kindred propositions usually attend the adoption of the initiative, or follow closely after.

The leading argument made in favor of the initiative is that it will, in the nature of a reserve power, only be used on rare occasions as a restraint upon improper action by the Legislature, and such seems to be the view taken by the Supreme Court of Oregon in *Kadderly v. Portland*, 44 Or. 118 (74 Pac. 710), wherein it is suggested that the powers of the Legislature of Oregon are not materially curtailed by the initiative amendment which is here attacked.

But it does not matter to what extent the people may make use of the initiative, for where a provision or power is repugnant to or inconsistent with the Federal Constitution,

> "it is no answer that in the actual exercise of the power each party may, if he chooses, avoid a positive interference with the other.
>
> "The objection lies to the power itself, and not to the exercise of it. If it exist, it may be applied to the extent of controlling, defeating, or destroying the other. It can never be presumed that the framers of the Constitution, declared to be supreme, could intend to put its powers at hazard upon the good wishes or good intentions or discretion of the States in the exercise of their acknowledged powers."
>
> *1 Story on Constitution,* 342.

The argument is not only false in principle, but unfounded in fact. Thus the election records of Oregon show that in 1904 (the first general election after the initiative amendment was adopted), two measures were upon the ballot for proposed direct legislation; in 1906 eleven (among them the measure taxing the defendant); in 1908 nineteen—ten Constitutional amendments and nine proposed laws; in 1910 thirty-two—eleven Constitutional amendments and twenty-one laws. Twenty-four of these measures of 1910 had their origin by the initiative petition, which "shall include the full text of the measure proposed", and cannot be amended after the filing. At the end of this brief we print a copy of that portion of the

ballot which applies to these thirty-two measures and was used at that general election.

And in *Kiernan v. City of Portland,* 112 Pac. 402, the Supreme Court of Oregon recognizes and upholds the sovereign power of the people to control the Legislature by the initiative.

Investigation also shows that the greatest percentage of electors who have voted on any of these measures for direct legislation since the adoption of the initiative amendment, is 90 per cent of the total number voting at any one election and the smallest is 62 per cent of such number, making it possible to carry a measure by a vote of less than 32 per cent; and any one of them might have been carried by a minority of all the electors voting at any election when it was submitted. The principal interest touching initiative measures at the election of 1910, related to three of them affecting the sale of liquor and upon which a fraction of over 86, 89 and 90 per cent, respectively, of those voting for Governor at such election took action; a fraction over 80 per cent voted on the Woman's Suffrage amendment, and of the residue, three received between 75 and 80; twelve between 70 and 75; twelve between 65 and 70, and one a fraction over 60 per cent of all such voters.

Even in Switzerland, the original home of the initiative and the referendum, and to which their advocates make frequent reference, these innovations have not given satisfactory results. Mr. Albert Bushnell Hart,

a moderate and impartial observer, in his article "Vox Populi in Switzerland" writes:

> "I must own to disappointment to the use made by the Swiss of their envied opportunity. On the 20 referenda between 1879 and 1891 the average vote in proportion to the voters was but 58.5 per cent; in only one case did it reach 67 per cent; and in one case, the patent law of 1887, it fell to about 40 per cent in the Confederation and to 9 per cent in the Canton Schwyz. On the serious and dangerous question of recognizing the right to employment * * * only 56 per cent participated."

The foregoing general considerations seem pertinent as illustrating the argument against the constitutionality of direct legislation, and as indicating in a general manner the relative importance and the theoretical and practical significance of the fundamental change which the people of Oregon have attempted to introduce into their form of government.

Argument.

I.

THE INITIATIVE AND THE TAX MEASURE IN QUESTION ARE REPUGNANT TO THE PROVISIONS OF SECTION 1 OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, WHICH FORBIDS A STATE TO DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

The plaintiff in error is a corporation formed and existing under the laws of Oregon, and, therefore, entitled to invoke this provision of the Federal Constitution.

Smyth v. Ames, 169 U. S. 466-522;
Santa Clara County v. Southern Pacific Railroad, 118 U. S. 394-396;
Gulf, Col. & S. F. Ry. v. Ellis, 165 U. S. 150-154.

And this amendment controls the action of all branches of the Government, legislative, executive and judicial.

Ex parte Virginia, 100 U. S. 339-347;
Yick Wo v. Hopkins, 118 U. S. 356-373;
Scott v. McNeal, 154 U. S. 34-45;
Blake v. McClung, 172 U. S. 232.

By reference to the official statutes of Oregon for 1907, page 9, it appears that the initiative act under which the license tax is claimed in this suit was "enacted" by a vote of 69,635 in favor of the same and 6,441 against. The total vote for Governor at this election was 96,751, so that 20,675 of the electors did not vote on this measure. *The only other initiative act* for the imposition of a tax which has been "enacted"

by the voters of Oregon since the adoption of the constitutional amendment in question, is one voted on at the same election and being, An Act requiring Sleeping Car Companies, Refrigerator Car Companies and Oil Companies to pay an annual license tax upon gross earnings, and which was adopted by a vote of 70,872 for and 6,360 against the same (Statutes of Oregon, 1907, p. 12). Thus since the adoption of this amendment, all tax payers in Oregon except those mentioned in these two initiative acts, have been taxed up to the time this suit was begun, solely under laws passed by the Legislature of the State. To compel plaintiff in error to pay this tax would not accord to it the equal protection of the laws, nor the protection of equal laws, because this exaction is peculiar to plaintiff in error, and the few others included in these two Acts, and is based upon alleged legislation which, for said period, is *entirely different in character and in the manner of enactment, from that which pertains to the taxation of all other residents of the State who have only been subject to tax laws passed by the Legislative Assembly.*

We may pause here to consider that the enactment of laws for the purposes of taxation is essentially judicial in its character. Madison, in No. X of the Federalist, says upon this subject:

> "The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominate party to trample on the rules of justice. Every

shilling with which they overburden the inferior number, is a shilling saved to their own pockets."

Hamilton's Works, Vol. XI, p. 72.

Under the initiative form of legislation the greatest opportunity and inducement are offered to a faction or ibal within a State to seek out certain interests, or asses, and impose upon them the principal burdens of axation, the object being, perhaps, to enlist the popular ote for their political purposes.

In *McCullough v. Maryland,* 4 Wheat., at p.* 427, Chief Justice Marshall, in speaking of the power of the Legislature to tax and the liability to unjust taxation, said:

> "The only security against the abuse of this power is found *in the structure of government itself.* In imposing a tax *the Legislature acts upon its constituents.* This is in general, a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the *legislator,* and on the influence of the constituent over their *representative,* to guard them against its abuse." (Italics ours.)

It is apparent that in this expression the distinguished Chief Justice regarded a representative Legislature as the only law making body of a State under the fundamental plan of our Government as embodied in the Federal Constitution; and this view is enforced by his language in *Providence Bank v. Billings,* 4 Peters, at p.* 563, as follows:

> "The interest, wisdom and justice of the *representative body,* and *its relations with its constituents,* furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally." (Italics ours.)

And in *United States v. New Orleans,* 98 U. S., at p. 392, this Court, speaking by Mr. Justice Field, said:

> "The position that the power of taxation belongs exclusively to the legislative branch of the government no one will controvert. Under our system it is lodged nowhere else. But it is a power that may be delegated by the *Legislature* to municipal corporations, which are merely instrumentalities of the State for the better administration of the government in matters of local concern."

And in *Ex parte Virginia,* 100 U. S., p. 339, this Court, speaking by Mr. Justice Strong, said, at p. 347:

> "A State acts by its Legislature, its executive or its judicial authorities. It can act in no other way."

And representation and taxation must go together.

In *Harward v. St. Clair Drainage Co.,* 51 Ill., at p. 135, the Supreme Court of Illinois said:

> "The power of taxation is, of all the powers of the government, the one most liable to abuse, even when exercised by the *direct representatives* of the people; and if committed to persons who may exercise it over others without reference to their consent, the certainty of its abuse would be simply a question of time. No persons or class of persons can be entrusted with irresponsible power over the property of others, and such a power is essentially despotic in its nature, and violative of all just principles of government."

The plaintiff in error, a resident of Oregon, and entitled to the equal protection of its laws, is called on to pay this tax because eight per cent of the voters of that State have seen fit to set on foot a proposed law, without any of the discussion or deliberation incident to legislative bodies, *not even restrained by an oath,* and with no responsibility to any one for their acts. With the few exceptions mentioned, all other residents of the State have only been required during the period covered by this tax measure to pay such taxes as the Legislature has seen fit to impose under the restraints pointed out by Chief Justice Marshall in the foregoing citations and no one of them has been subjected to a tax upon gross earnings. It appears, moreover, that during this period the plaintiff in error paid to the State of Oregon an annual license fee, required by statute for the privilege of doing business as a corporation, and also paid all State, municipal and school taxes levied upon all of its property in the State, including its franchise to do business, and assessed by the proper officers, acting under laws passed by the Legislature (53 Or. 163).

Nor would it be necessary that this condition should actually exist in order that this Oregon constitutional amendment, and all attempted legislation thereunder, should be held to be without force. The fact that such consequences *might* ensue is sufficient to destroy their validity.

> "The test of the constitutionality of a statute is not what has been done but what by its authority may be done."
>
> *Ames v. People,* 26 Colo. 83, 56 Pac. 656.

This takes us back to the fundamental proposition that under our system of government, *there can be but one source of legislation, but one law making power in a State, and that power a Legislature chosen and acting as contemplated by the Federal Constitution.* With two sources of legislation in a State—in this instance wholly unlike in character and operation—there can be no equal rights, no equal protection, no equal laws; and no resident of such a State may rest upon the assurance of the equal protection of the laws.

Apart from all the other obvious advantages to the tax payer, arising from the investigation, discussion and deliberation incident to the usual manner of legislation, and of which he is deprived by this initiative method, we make special mention of the privilege of being heard before the law making body; a right always recognized and without which he is deprived of the equal protection of the laws. This right of the taxpayer to a hearing as to the amount of his tax, extends to the Legislature when the same is determined by that body.

Cooley on Constitutional Limitations, 7th Ed. 497-498;

2 Story on the Constitution, Sec. 1894.

The only distinction in this regard between the Legislature and an inferior body acting under its authority, is that with the former no notice is required, as all are bound to take notice of its sessions and proceedings. The right is reserved to the people, however, to present

their views to the Legislature, through petition or otherwise, on any subject in which they may be concerned.

U. S. v. Cruikshank, 92 U. S. 542-*552*;
State Tax-Law Cases, 54 Mich. 350-*382*.

If the Legislature of Oregon proposed to fix the rates which might be charged by plaintiff in error, as a public service corporation, there could be no question of its right to be heard in advance, as to the provisions of such a law; but under the initiative method an individual, or coterie, unrestrained by oath or otherwise, with the consent of eight per cent of the voters may file such a measure with the Secretary of State, even before the corporation is aware that it has been contemplated, and the same must then be submitted to vote as an entirety, no amendment thereto being possible. (*Home Telephone Co. v. Los Angeles,* 211 U. S. 265-*280*.) And while we desire and intend to always speak with respect of the individuals who have promoted the initiative movement in Oregon, and concede their motives to have been to subserve the public interests, it may be added that the person or persons drafting such a measure may not even be citizens of that State and may be inspired by a purpose wholly foreign to the accepted principles of legislation. Our position is that this movement, even though actuated by good intentions, is revolutionary and subversive of those fundamental principles of the Government which should be preserved as given by our fathers.

Mr. Justice Brown, in *Turpin v. Lemon,* 187 U. S., at p. 60, speaking for this Court said:

> "Under the fourteenth amendment, the Legislature is bound to provide a method for the assessment and collection of taxes that shall not be inconsistent with natural justice."

And in *Blake v. McClung,* 172 U. S., at p. 160, it was said for the Court, by Mr. Justice Harlan:

> "The fourteenth amendment controls the action of all branches of government—legislative, executive and judicial."

And aside from the fourteenth amendment the powers of taxation which might be exercised through initiative legislation, would be violative of the implied rights to the protection of property which pertain to every person under the Federal Constitution.

In *Loan Association v. Topeka,* 20 Wall, at pp. 662-63, Mr. Justice Miller, speaking of such rights, said:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognizes no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. * * * The theory of our government, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact

could not exist, and which are respected by all governments entitled to the name."

But we need not go so far in this case.

Our argument is illustrated and enforced by reference to an amendment to Article IX of the Constitution of Oregon, adopted upon initiative petition at the general election of 1910, and which reads:

> "Sec. 1-a. No poll or head tax shall be levied or collected in Oregon; no bill regulating taxation or exemption throughout the State shall become a law until approved by the people of the State at a regular general election; none of the restrictions of the Constitution shall apply to measures approved by the people, declaring what shall be subject to taxation or exemption and how it shall be taxed or exempted, whether proposed by the Legislative Assembly or by initiative petition; but the people of the several counties are hereby empowered and authorized to regulate taxation and exemptions within their several counties, subject to any general law which may be hereafter enacted."

By this amendment no measure passed by the Legislature, affecting taxation, can become a law until *approved by the people* at a regular general election, and *none of the restrictions of the Constitution apply to measures of taxation so approved* or initiated by the people; the only taxing function left to the Legislature is to submit proposed laws to be voted on by the people whose measures are released from all restrictions of the State Constitution, and who may initiate such laws for the regulation of taxation and exemptions as they see fit, disregarding the Legislature and the rule of

equality and uniformity if they wish, and arbitrarily exempting certain classes of persons and property altogether.

The consequences of such a system of taxation are obvious and need not be enlarged upon. The advocates and sponsors of this amendment, in their arguments therefor, asserted, in brief, that by its adoption the voters would take *into their own hands* the sole power to say by law:

1. What property shall be taxed and how it shall be taxed;

2. What property shall be exempt from taxation and how such exemptions shall be made;

and would grant

3. Limited home rule to the people of each county.

And in their affirmative argument in support of this amendment, which was passed to each voter with his ballot, they also claimed that its approval would, to use their own language, "give to the plain people and taxpayers of Oregon more bread and butter profits from the Government than they have ever had in the past". The vote on this amendment was 44,171 for and 42,127 against; the difference in its favor being 2044. The total vote for Governor at the same election was 117,690, being 31,392 greater than the entire vote on this amendment. It will be remembered that under the Oregon plan it is a majority of *those voting on a proposition,* not a majority of all the voters, which determines the

result; so that, under this rule, the amendment in question was adopted by a fraction over 37½ per cent of those voting at the same election for Governor.

The statement of the proceedings taken in Oregon under the initiative amendment since 1906, it is submitted, shows that with initiative taxation, and the resulting dual system of legislation within a State, there can be no equal protection of the law for persons or property, either in theory or in fact.

II.

THE INITIATIVE AMENDMENT AND THE TAX IN QUESTION LEVIED PURSUANT TO A MEASURE PASSED BY AUTHORITY OF THE INITIATIVE AMENDMENT VIOLATE THE RIGHT TO A REPUBLICAN FORM OF GOVERNMENT WHICH IS GUARANTEED BY SEC. 4 OF ART. IV OF THE FEDERAL CONSTITUTION.

1.

THE GUARANTY OF ARTICLE IV, SECTION 4, OF THE FEDERAL CONSTITUTION, IS TO THE PEOPLE OF THE STATES, AND TO EACH CITIZEN, AS WELL AS TO THE STATES AS POLITICAL ENTITIES.

The language of the provision is:

> "The United States shall guarantee to every State in this union a republican form of government," etc.

Ex necessitate rei, the guaranty is to the citizens of the States as well as to the States as political entities; nor is it a guaranty merely to the majority of the citizens of a State. It is entirely probable that those occasions on which the necessity for intervention by the Federal Government will be most acute, will arise when the Federal guaranty is invoked by the citizens of a State against the acts of an oppressive majority. It is likely that the protection of the Federal Government will be needed most when the State Government is in the hands of those who seek to deprive a helpless minority of its constitutional rights. Would the acquiescence of a State Government in the establishment of a despotism deprive protesting citizens of the aid of the Federal power? Would the acts of a dictator bind those

individuals who might appeal to the National Government? Would not the guaranty of a republican government be enforced? Would not the course of a willing majority in establishing an illegal form of government be checked upon the complaint of a single voter? These questions answer themselves. It is apparent that the assurance of Article IV of the Constitution is to every member of the Federal commonwealth, and protects him as well against the acts of his own State, or its people, as it protects the State itself against invasion or anarchy.

These considerations make it evident that the reserved powers of the States have further limitations than those expressed in the Federal Constitution; they illustrate the full meaning of the doctrine that the first section of the Fourteenth Amendment added nothing to the rights of the citizens of the United States (see *U. S. v. Cruikshank, infra*), the rights fundamental and implied, which no State, and which no people of a State, may override, rights which find their broadest expression in the guaranty of a republican form of government to the States and to all of the people of each State.

It will be conceded that with or without the consent of the lawfully constituted authorities of a State, with or without the consent of the voters of a State, no despot, no monarch, would be permitted to rule in any commonwealth within the nation. But all agree that the despotism of the multitude is as arbitrary and complete as the absolutism of a despot. Both may, if they choose, rule without reason; both account only to themselves; neither is responsible to the whole people. Nor could

it be contended that in the absence of the expressed guaranty of a republican form of government the matter would be otherwise. The right to a representative form of rule, to a government in which every subject shall be heard and represented, rests on broader grounds than the fourth clause of Article IV of our Federal Constitution. It is an inherent attribute of the citizenship of the United States, which no State or its people may impair.

In the message sent by President Taft to Congress on August 15, 1911, in which the recall provisions of the proposed Arizona Constitution were discussed, the President said:

> "Now, as the government is for all the people, and is not solely for a majority of them, the majority, in exercising control, either directly or through its agents, is bound to exercise the power for the benefit of the minority as well as the majority."

And again:

> "A popular government is not a government of a majority, by a majority, for a majority of the people. It is a government of the whole people, by a majority of the whole people under such rules and checks as will secure a wise, just and beneficent government for all the people."

Judge Jameson, in his work on Constitutional Conventions, Section 568, says the following:

> "From this it is apparent that a mere majority in number of all the citizens of a State, or of the electors of a State, have no right whatever to act for the whole State unless they can point to authority to that effect, express or implied in the

Constitution of the State, and that, if the action taken or proposed by such majority is palpably in the teeth of the constitutional provision, it is usurping and revolutionary."

No Court would compel obedience to the enactments of a hereditary legislature created by the vote, however overwhelming, of the people of a State, or of a hereditary committee, or of an individual with hereditary succession. In no essential feature would such a government violate more directly the principles of representation and of a republican form of government than does the organization of a pure democracy. It is against such violation that the provisions of Article IV, Section 4 of the Federal Constitution protect every person in the United States.

The meaning of the word "State", as used in clause 4 of Art. IV of the Constitution, was stated by Chief Justice Chase, in *Texas v. White,* 7 Wall. 730, as follows:

> "It is not difficult to see that in all these senses the primary conception (that is, of a state) is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.
>
> "This is, undoubtedly, the fundamental idea upon which the republican institutions of our own country are established."

Exemplifying the use of the word "State" to signify a political unit (as in the provision that prohibits the States from making treaties), or to signify a geographi-

cal division (as in the clause requiring the representatives in Congress to be inhabitants of the State where chosen), the Court continues:

> "And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, *of a people or political community, as distinguished from a government.*
>
> "*In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every state in the Union a republican form of government,* and shall protect each of them against invasion.
>
> "In this clause a plain distinction is made between a state and the government of a state." (Italics ours.)

The guaranty, then, is to the people of Oregon; the people who by the act admitting Oregon to the Union "were invested with all the rights * * * of the "original thirteen States under the Constitution." *(Texas v. White, supra.)*

2.

SECTION 4 OF ARTICLE IV, THEREFORE, PROHIBITS THE MAJORITY IN ANY STATE FROM ADOPTING AN UNREPUBLICAN CONSTITUTION.

In examining into the history of this clause of the Constitution we find it first offered by Governor Randolph as the eleventh resolution submitted to the Federal Convention (*Elliott's Debates,* Vol. V, p. 128). It was then in the following form:

> "*Resolved.* That a republican government and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State."

It was amended by the Convention, on June 9th, to read:

> "That a republican constitution and its existing laws ought to be guaranteed to each State by the United States;" (*Ib.* V., p. 182).

and was so reported by the Committee of the Whole on June 13th (*Ib.* V, p. 190).

During the discussion of the resolution, as a part of the Committee's Report, Randolph said:

> "The resolution has two objects: first, to secure a republican government; secondly, to suppress domestic commotions; he urged the necessity of both of these provisions." (*Ib.* V, p. 333);

and later he

> "moved to add, as an amendment to the motion, *'and that no State be at liberty to form any other than a republican government'*. Mr. Madison seconded the motion.
>
> "Mr. Rutledge thought it unnecessary to insert any guaranty. No doubt could be entertained but that Congress had the authority, if they had the means, to co-operate with any State in subduing a rebellion. It was and would be involved in the nature of the thing.
>
> "Mr. Wilson moved, as a better expression of the idea, 'That a republican form of government shall be guaranteed to each State, and that each State shall be protected against foreign and domestic violence'.
>
> "This seeming to be well received, Mr. Madison and Mr. Randolph withdrew their propositions, and on the question for agreeing to Mr. Wilson's motion, it passed, Nemo. con."
>
> *Ib.* V, p. 333.

There is thus clear evidence from the authors of the provision that the clause was a direct prohibition against the adoption by any State of an unrepublican Constitution. And, as is pointed out in *Martin's Exrs. v. Martin, infra,* obedience to this inhibition is to be enforced equally with other restrictions on the powers of the States or of the people of the States.

The Supreme Court of Connecticut in a recent decision, speaking through Chief Justice Simeon E. Baldwin, says:

> "Our constitution (Article III, Section 1) vests the 'legislative power of this State' in the general assembly. That power covers the whole field of legitimate legislation, except so far as limitations are to be found in other provisions of this constitution or in that of the United States. The latter provides (Article IV, Section 4) that the 'United States shall guarantee to every state in this Union' a republican form of government. Connecticut is, therefore, impliedly bound forever to maintain such a form of government.
>
> "She put her legislative power in the hands of the general assembly. She put only, because she could put only, such power of that nature as was consistent with a republican form of government."
>
> *Appeal of Allyn,* 81 Conn. 534.

Mr. Cooley, in his work on "Constitutional Limitations", discussing the power of the people of a State to amend or revise their Constitution says that it is limited by the Constitution of the United States in these respects:

> "(1) It must not abolish the republican form of government, since such act would be revolutionary in its character, and would call for and demand

direct intervention on the part of the government of the United States.

"(2) It must not provide for titles of nobility, or assume to violate the obligation of any contract, or attaint persons of crime, or provide ex post facto for the punishment of acts by the courts which were innocent when committed, or contain any other provision which would, in effect, amount to the exercise of any power expressly or impliedly prohibited to the States by the Constitution of the Union. For while such provisions would not call for the direct and forcible intervention of the government of the Union, it would be the duty of the courts, both State and national, to refuse to enforce them, and to declare them altogether void, as much when enacted by the people in their primary capacity as makers of the fundamental law, as when enacted in the form of statutes, through the delegated power of their legislatures." (7th Ed., p. 62.)

In *Koehler v. Hill*, 15 N. W. 609, 60 Ia. 543, the Court said:

"It is well that the powers of the people and their relations to organized society should be understood. *No heresy has ever been taught in this country so fraught with evil as the doctrine that the people have a constitutional right to disregard the constitution, and that they can set themselves above the instrumentalities appointed by the constitution for the administration of law.* It tends directly to the encouragement of revolution and anarchy. It is incumbent upon all who influence and mould public opinion to repudiate and discountenance so dangerous a doctrine before it bears fruits destructive of republican institutions. It will be well if the people come to understand the difference between natural and constitutional freedom, before license becomes destructive of liberty. * * * (15 N. W. 615-6.) (Italics ours.)

> "We have approached and discussed this grave question with a full appreciation of the responsibilities which it involves, and we have given to its consideration the earnest attention which its importance demands. We have sought to maintain the supremacy of the constitution at whatever hazard. It is for the protection of minorities that constitutions are framed. Sometimes constitutions must be interposed for the protection of majorities even against themselves. Constitutions are adopted in times of public repose, when sober reason holds her citadel, and are designed to check the surging passions in times of popular excitement. But if courts could be coerced by popular majorities into a disregard of their provisions, constitutions would become mere 'ropes of sand', and there would be an end of social security and of constitutional freedom." (15 N. W. 630.)

Von Holst, at pages 236-7 of his "Constitutional Law of the United States of America", speaks of the restriction implied in the guaranty and says:

> "It not only promises the states that the Union will interpose with all its might on their behalf, if internal or external enemies threaten or overthrow their republican form of government, but it absolutely forbids them to adopt any other form of government under any conditions, or for any reasons whatever. The United States give a pledge to themselves and to their constituent members that they will always remain a republic and, indeed a federative republic."

The effect of the Constitution as a fundamental restriction upon the people of the States in the formation of their governments was fully appreciated by one of the most bitter opponents of the Constitution, Patrick Henry. Speaking in the Virginia Convention, he said:

"Suppose the people of Virginia should wish to alter their government; can a majority of them do it? No; because they are connected with other men, or, in other words, consolidated with other States. When the people of Virginia, at a future day, shall wish to alter their government, though they should be unanimous in this desire, yet they may be prevented therefrom by a despicable minority at the extremity of the United States. * * *

"This government is not a Virginian, but an American government."

Elliott's Debates, Vol. III, p. 55.

He was unquestionably correct in his analysis of the proposed Constitution. He saw but did not value the impending creation of a Union of which all the people would be citizens.

As is said by Black in his work on Constitutional Law, 2nd Ed., p. 262:

"In effect the guaranty does not only contain a promise to each State that it shall continue to enjoy a republican form of government as long as the Union endures, but it also imports a command to each State to maintain and preserve that form of government under penalty of the intervention of the federal union for the benefit of all its members."

In *Rice v. Foster,* 4 Harr. (Del.) 479, it was said:

"And although the people have the power, in conformity with its provisions, to alter the constitution, under no circumstances can they, so long as the Constitution of the United States remains the paramount law of the land, establish a democracy, or any other than a republican form of government." (p. 488.)

In *Minor v. Happersett,* 21 Wall. 162, the Court said, in speaking of the guaranty of a republican form of government in Article IV, Section 4:

"The guaranty necessarily implies a duty upon the part of the States themselves to provide such a government."

In *Martin's Exrs. v. Martin,* 20 N. J. Eq. 421, the Court of Chancery of New Jersey said (p. 423):

"A constitutional government, as distinguished from an absolute government or a despotism, is one limited in its powers. The powers conferred are sovereign, but not universal. It is not necessary to attain a good and efficient government, that the people to be governed should surrender all their natural rights to its dominion. That people is most free who surrender the fewest, and none but those necessary to attain the end. This maxim applies as well when the government is purely democratic, as when vested in a single and hereditary monarch. The despotism of a majority, when unjust, is as insufferable as that of a king. Constitutions are the only social compacts which have ever had actual existence and construing them usually consists in determining whether the power exercised in the case presented was conferred on the government.

"The Federal Constitution calls for another consideration. The sovereign power had before been vested in the state governments, with certain limitations. In all, there were many things over which neither the legislature nor any other department of government had power. The rights, over which no control was given, were reserved to the people, but were reserved to them individually. There was no power in the people as a body, as a grand democracy, by a vote of the whole, to invade these rights. When these were reserved they could not prohibit the free exercise of any religion, or affect the enjoyment of life, liberty, or property, by any bill of attainder, *ex post facto* law, or any direct vote, but only by due process of law. It is, therefore, no reason for holding that a power is conferred upon the national government, that such power would

> otherwise be destroyed, because there is provided no mode in which the people can exercise it. *Many powers, like the power to take the life, liberty or property at will, a power only of absolute despotism were not intended to be exercised by any one, but to be wholly annihilated.*" (Italics ours.)

The power of the majority of the people to impose upon a State a democratic form of government, or to adopt institutions violating the republican form, is one of the powers which, in the language of the Court, was not intended to be exercised by anyone "but to be wholly annihilated".

The Court likened the guaranty of a republican form of government to the constitutional prohibitions against the enactment of laws impairing the obligations of contracts, *ex post facto* laws, and of all acts which are inconsistent with the aims of both the State and Federal Governments, saying:

> "Such laws were well classed with bills of attainder and *ex post facto* laws, *and the prohibition was introduced into the Constitution on the same ground as the guaranty of a republican form of government to each state.* They were prohibited as inconsistent with that liberty and security which both state and national governments were designed to provide for." (pp. 426-7.) (Italics ours.)

And it is apparent that the right to a republican form of government is an attribute of citizenship, of at least equal dignity with the right of protection against bills of attainder, *ex post facto* laws and laws impairing contractual obligations and because it violates the right to government in the republican form the initiative method of legislation is unconstitutional.

III.

TAXATION BY THE INITIATIVE METHOD VIOLATES FUNDAMENTAL RIGHTS AND IS NOT IN ACCORDANCE WITH THE "LAW OF THE LAND" (U. S. Const., Art. VI).

Apart from the express guaranty of the Constitution, any "law" passed in contravention of the fundamental principles upon which our Government rests, any statute enacted without reference to the forms of government perpetuated in the States by the Federal Constitution, any act published as the will of the people in a manner other than through the medium of a representative assembly and elected legislators, that is, by a legislature such as the Federal Constitution implies and upon which the Federal Constitution is based, any such measure is not, we submit, enacted in accordance with, nor can its enforcement be in accordance with, the "law of the land" (U. S. Const., Art. VI).

As was said by Chief Justice Harrington:

> "An act which would subvert our republican form of government would violate the entire constitution and come in conflict with a provision of the Constitution of the United States which guarantees this form of government to each of the States."
>
> *State v. Allmond,* 2 Houst. 612, 639.

It is a familiar argument made by those who uphold the legality of direct legislation in this country, that, except in so far as the powers of government were surrendered to the National Government, the States reserved to themselves full and complete powers of government; that the people of a State, or the majority of

its people, or of its voters, have no restrictions upon their powers, except those contained in the Federal Constitution. This may be conceded, with the reservation, however, that a Government chosen by the majority of the people of a State must respect the rights of the whole people as citizens of the republic, and that every person within the jurisdiction of a State is entitled to full preservation, against invasion by a majority, of those rights which are secured to all by the Federal Constitution and by the form of government which it provides.

See, also,

Martin's Exrs. v. Martin, 20 N. J. Eq. 421;
Cooley, Const. Limitations (7th Ed., p. 62).

One of the main purposes of the Union was to invest the people of the several States with the national guaranty of certain rights and privileges. A dual citizenship was conferred, citizenship of the United States and of each State. This was the fundamental feature distinguishing the Constitution of the United States and the Union from the Articles of Confederation and the Confederation.

It was thought necessary, to

> "abolish the confederation and establish a federal republic in which the general government should act directly upon the people."
>
> *Fiske Critical Period American History,* 250.

The sovereign power of the States over their citizens is subordinate to the power of the National Government over its citizens.

See

Koehler v. Hill, supra.

"We are all citizens of the United States."

Crandall v. Nevada, 6 Wall. 35.

The people through the Constitution established a Government acting with

> "ample power directly upon the citizens, instead of the confederate government which acted, with its powers greatly restricted, only upon the States."
>
> *Lane County v. Oregon,* 7 Wall. 76.

Speaking of the Federal Government, Story says:

> "Its duties being moreover, imposed for the general benefit and security of the several states in their political character, and of the people both in their sovereign and individual capacity, if these objects be not obtained, the government does not answer the end of its creation. It is, therefore, bound to the several states, respectively, and to every citizen thereof, for the due execution of those duties; and the observance of this obligation is enforced under the solemn sanction of an oath from those who administer the government."
>
> *Story on the Const.,* Sec. 318, Vol. I, p. 227.

Wilson, in the Federal Convention, is reported as follows:

> "In explaining his reasons it was necessary to observe the two-fold relation in which the people would stand—first, as citizens of the general government; and secondly, as citizens of their particular state. The general government was meant for them in the first capacity; the state governments in the second."
>
> *Elliott's Debates,* Vol. V, p. 239.

In *U. S. v. Cruikshank,* 92 U. S. 542, this Court, speaking by Chief Justice Waite, said at page 549:

> "We have in our political system a government of the United States and a government of each of the several states. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a state, *but his rights of citizenship under one of these governments will be different from those he has under the other.*" (Italics ours.)

The citizens of the United States receive from the Federal Government the protection of the rights which are conferred upon them by their national citizenship. The majority of the people of a State cannot, even by amendment of the State's organic law, encroach upon these privileges.

In *U. S. v. Cruikshank (supra),* in speaking of the right under the 14th Amendment to the equal protection of the laws, it was said:

> "*Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there.* The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty." (Italics ours.) (p. 555.)

Applying this language:

1. Legislation by representatives elected for that purpose is the distinguishing feature of a republican form of government.

2. The duty to provide a republican form of government "was originally assumed by the States; and it "still remains there". And the maintenance of the right is guaranteed to the people of the States by the National Government.

U. S. Const., Art. IV, Sec. 4;
Texas v. White, 7 Wall. 730.

3. Therefore, every citizen of the United States is entitled to the protection of the Federal Government in his right to be governed by laws enacted only by representatives elected for that purpose, and in accordance with a republican form of government. Such is the "law of the land".

U. S. Const., Art. IV, Art. VI.

Speaking of the phrase "the law of the land", the Court, in *University of Maryland v. Williams*, 9 Gill. & J. 365, said at p. 412:

> "By 'the law of the land' is meant, by the due course and process of the law (Co. Ins. in the commentary upon the same words in *Magna Charta*). The general law, prescribed and existing as a rule of civil conduct, relating to the community in general, judicially to be administered by courts of justice."

> "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Charta."

Murray v. Hoboken Land Co., 59 U. S. 272.

Thus the constitutional provision entitling every person to the administration of a government in accordance with due process of law, i. e., the "law of the land" is (as has been pointed out in another part of the argument), a restraint alike upon the legislative, executive and judicial powers.

Murray v. Hoboken Land Co. (supra).

It is a restraint upon

> "the actions of the political body denominated a State by whatever instruments or in whatever modes that action may be taken".
>
> *Ex parte Virginia,* 100 U. S. 339.

Due process of law is such an exertion of the powers of the Government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe.

> *Ex parte Ah Fook,* 49 Cal. 402, quoting *Cooley, Const. Lim.*

It is here contended that no binding rule of conduct can be created, no law can be made, no tax can be levied, except in accordance with the settled forms of our republican Government. "Due process of law" means not only that there shall be a procedure sanctioned by the well-established principles of right and justice, but it must be a procedure prescribed by *law.* In *Allgeyer v. Louisiana,* 165 U. S. 578, Mr. Justice Peckham, speaking of the Act under consideration, said:

> "The statute which forbids such act does not become due process of law because it is inconsistent with the provisions of the Constitution of the Union."

The edicts of a multitude could not be the basis of due process, however fair the steps prescribed. Laws must emanate from the *law-making power,* and in a constitutional republic that power can only be a *representative* Legislature created in accordance with the organic law.

It is, of course, a well-settled general rule that the acts of a State Legislature will not be declared unconstitutional unless in violation of some constitutional provision. And the same principle must be applied to the acts of the States exercising their residuary sovereignty through any other of the departments of government, or through the people directly.

But the rule that acts will not be declared unconstitutional, unless an express provision of the Constitution is violated, is qualified.

Indeed, it has been frequently recognized that there are principles lying at the base of our Government which, though not expressed in the Constitution, may not be contravened—which Tiedeman describes as

> "the real, living constitutional law,—that which the people are made to feel around and about them, controlling the exercise of power by government, and protecting the minority from the tyranny of the majority—the flesh and blood of the Constitution", instead of "its skeleton", and which he said "is here, as well as elsewhere, unwritten".
>
> *Unwritten Const. of the U. S.*, p. 43.

These limitations upon the powers of the people of the States, and upon their Legislatures, are referred to in

Holden v. Hardy, 169 U. S. at p. 389.

Mr. Justice Brown there said:

"While the people of each State may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the Constitution of the United States certain fundamental principles to which each member of the Union is bound to accede as a condition of its admission as a State. Thus, the United States are bound to guarantee to each State a republican form of government, and the tenth section of the first article contains certain other specified limitations upon the power of the several States, the object of which was to secure to Congress paramount authority with respect to matters of universal concern. In addition, the Fourteenth Amendment contains a sweeping provision forbidding the States from abridging the privileges and immunities of citizens of the United States, and denying them the benefit of due process or equal protection of the laws.

"This court has never attempted to define with precision the words 'due process of law', nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence. What shall constitute due process of law was perhaps as well stated by Mr. Justice Curtis in *Murray's Lessees v. Hoboken Land Co.*, 18 How. 272, 276, as anywhere. He said: 'The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. * * * To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be two-fold. We must examine the Constitution itself, to see

> whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

And see the language of this Court in *Loan Association v. Topeka*, 20 Wall. 655, *supra*.

In *C. W. & Z. R. R. Co. v. Commrs. of Clinton Co.*, 1 Ohio State 77, 87, the Court said:

> "The checks, balances and safeguards of that instrument (i. e., the Constitution) are intended no less for the protection and safety of the minority than the majority; hence while it continues in force, every citizen has a right to demand that his civil conduct shall be regulated by the associated wisdom, intelligence and integrity of the whole representation of the State."

In a discussion of direct legislation, in *Parker v. Commonwealth*, 6 Barr 507, it was said:

> "Unlike that of the United States, the government of Pennsylvania is not one of enumerated powers. Still it is a government of limited authority; and it is, therefore, not to be denied that the action of its legislature may be invalid, though it contravene no express provision of the Constitution, if it be in violation of the spirit of that instrument, and the genius of the public institutions designed to be created by it. Indeed, it is this species of insidious infraction that is more to be feared and guarded against than direct attacks upon any particular principle proclaimed as a part of the primordial law; for attempts of the latter description will, generally, be met by instant reprobation, while the stealthy and frequently seductive character of

the former is apt to escape detection, until the innovation is made manifest by the infliction of some startling wrong."

And see:

Maynard v. Bd. of Commrs., 84 Mich. 228, 239;
Comm. v. Moir, 199 Pa. 534; 53 L. R. A. 845.

In *People v. Hurlbut*, 24 Mich. 44, Judge Cooley, in an elaborate opinion, held that a State Legislature had no power to appoint municipal officers. The ruling was based on nothing expressed in the Constitution of the State of Michigan, but on the principles lying at the foundation of the American Government. Brushing aside minor objections to the statute, the learned Judge said:

> "These, however, are matters of secondary importance; there lies over and beyond these a question of the highest interest and concern, which cannot be answered without a careful scrutiny of the structure of our government, and an examination of the principles which underlie free institutions in America."

Pointing out that there were no specific restrictions imposed upon the legislative discretion with regard to the appointment of municipal officers, the opinion proceeds:

> "We must assume either an intention that the legislative control should be constant and absolute, *or, on the other hand, that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made.*

That this last is the case, appears to me too plain for serious controversy. * * * The Constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations." * * *

"*The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our cities by law, it would hardly do to call upon a protesting people to show where, in the constitution, the power to establish it was prohibited; it would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred. Some things are too plain to be written.* If this charter of State government, which we call a constitution, were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain; but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which, in Europe, have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give—this

> living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone. * * * The men who framed our institutions have not so understood the facts. With them it has been an axiom, that our system was one of checks and balances; that each department of the government was a check upon the others, and each grade of government upon the rest." (pp. 94, 97, 98, 106, 107.)

If the implied restrictions on the legislative power forbid the destruction of municipal self-government, are there no inherent prohibitions against the destruction of the republic? Nothing that forbids the planting of democracy in our Government? And if an oligarchy may not be established in this country, though no express prohibition of the Constitution forbids it, why is the case otherwise with a democracy? Each is equally unrepublican; each was equally hateful to the founders of our Government, and each is equally subversive of the structure which they erected.

In *Lexington v. Thompson* (Ky.), 57 L. R. A. 775; 68 S. W. 477, it is said:

> "So, Von Holst, Const. Law, 271, after stating the general rule that the legislative power of the state legislatures is unlimited so far as no limits are set to it by the federal or state constitution, proceeds: 'This does not mean, however, that these restrictions must always be expressed in explicit words. As it is generally admitted that the factors of the federal government have "certain implied powers", so it has never been disputed that the state legislatures are subject to "implied restrictions"; that is, restrictions which must be deduced from certain provisions of the federal or state constitutions, or that arise from the political nature

of the Union, from the genius of American public institutions.' * * * a constitution is 'not the beginning of a community, nor the origin of private rights. It is not the fountain of laws, nor the incipient state of government. It is not the cause, but consequence, of personal and political freedom. It grants no rights to the people, but is the creature of their power, the instrument of their convenience, designed for their protection in the enjoyment of the rights and powers which they possessed before the Constitution was made. It is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought * * *

"'* * * Laws may be and have been declared invalid, although not repugnant to any express restriction contained in the fundamental law.'"

In *Downes v. Bidwell,* 182 U. S. 244, it is said by Mr. Justice White in his concurring opinion:

"Whilst, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the Territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended. But this does not suggest that every express limitation of the Constitution which is appicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, *there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.*" (pp. 290-1.) (Italics ours.)

And see:

Wilkinson v. Leland, 2 Pet. 657;
Terrett v. Taylor, 9 Cranch. 43;
Bradshaw v. Rogers, 20 Johns. 102;
Camp v. Rogers, 44 Conn. 291;
State v. Williams College, 9 Gill. & J. 365.

In a remarkably clear decision in the case of *The People v. Humphrey,* 23 Mich. 471, the Court held that the Legislature of Michigan could not authorize condemnation of lands for the use of the United States. Justice Cooley there said:

> "It may be said that there is no constitutional provision which expressly declares that the State shall have no authority to appropriate property for the public uses of the United States, and that the powers not prohibited may, on general principles, be exercised. But any such express prohibition would be an act of supererogation. All constitutions are subject to certain implications, which are as effectual limitations upon power as if expressly declared. *One of these is, that the constitution itself is made to define, limit and apportion the powers of the government it creates or controls, and not those of some other government or authority.*"

The opinion concludes in the following language:

> "For the reasons assigned, the legislation in question is void. *The enactments before us could not be adopted by the legislature, because not within the sphere of State powers. They, therefore, constitute an attempt to appropriate the property of individuals without due process of law;* and the State authorities were justified at any point in abandoning the proceedings taken under them." (pp. 481, 482, 483.) (Italics ours.)

It is claimed, therefore, that, apart from the guaranty clause, all citizens of the United States may demand government in conformity with republican principles.

The framers of the Constitution did not intend that its expressed provisions should be considered the full measure of the rights of the citizen.

In No. 84 of the *Federalist* Hamilton, in discussing the objection that the Constitution contained no bill of rights, showed that those natural rights which inhere in citizenship in a free republic, require no expression in a written instrument. Speaking of the absence of an express guaranty of the liberty of the press, he said:

> "Its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and the government, and here, after all, as is intimated on another occasion, must we seek for the only solid basis of all our rights."
>
> *XII Hamilton's Works,* p. 327.

> "Bills of attainder, *ex post facto* laws and laws impairing the obligations of contracts are contrary to the first principles of the social compact, and of every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters."
>
> Madison, *"Federalist"* No. 44. *XI Hamilton's Works,* p. 370.

The adoption of the ten amendments undoubtedly facilitated the approval of the Constitution, but the amendments were widely considered unnecessary.

As was said by Nicholas, in the Virginia Convention, in discussing the Federal Constitution and before the adoption of the first ten amendments:

> "A bill of rights is only an acknowledgment of the pre-existing claim to rights in the people. They belong to us as much as if they had been inserted in the Constitution."
>
> *Elliott's Debates,* Vol. III, p. 451.

In *Minor v. Happersett,* 21 Wall. 161, the Court, speaking by Chief Justice Waite, said of the 14th Amendment, p. 171:

> "The amendment did not add to the privileges or immunities of a citizen."

In *U. S. v. Cruikshank (supra)* it was said:

> "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances or for anything else connected with the powers or duties of the National government, is an *attribute of National citizenship* and as such under the protection of and guaranteed by the United States. The very idea of government republican in form implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs, and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the Statute and within the scope of the sovereignty of the United States." (p. 552.)

Speaking of the "due process" clause of the 14th Amendment, Chief Justice Waite said that it

> "adds nothing to the rights of one citizen as against another. It simply furnishes an additional guar-

> anty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society." (p. 554.)

So the Court, speaking of the provision for the equal protection of the laws, said:

> "This provision does not, any more than the one which just precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle if within its power." (pp. 554-555.)

If the right of petition is an attribute of national citizenship and implied in the constitutional provision for a republican form of government, is not the right of government by representation likewise such an attribute and likewise so implied?

Is the right to government by representation not a principle of republicanism? And if so, is it not the bounden duty of the government to protect that right? If the 14th Amendment was not needed to add the right of equal protection to the rights of the citizens of the republic, is an amendment to the Constitution needed to entitle citizens to government by representation? Can due process of law in this country rest in any other form of government?

IV.

THE INITIATIVE IS IN CONTRAVENTION OF A REPUBLICAN FORM OF GOVERNMENT. GOVERNMENT BY THE PEOPLE DIRECTLY IS THE ATTRIBUTE OF A PURE DEMOCRACY AND IS SUBVERSIVE OF THE PRINCIPLES UPON WHICH THE REPUBLIC IS FOUNDED. DIRECT LEGISLATION IS, THEREFORE, REPUGNANT TO THAT FORM OF GOVERNMENT WITH WHICH ALONE CONGRESS COULD ADMIT A STATE TO THE UNION AND WHICH THE STATE IS BOUND TO MAINTAIN.

1.

DIFFERENCE BETWEEN A REPUBLIC AND DEMOCRACY.

The difference between the republican and democratic forms of government is that in the former the people rule by their representatives elected for that purpose; in the latter the people themselves exercise the powers of government directly.

Webster defines a republic to be:

> "A state in which the sovereign power resides in the whole body of the people, and is exercised by representatives elected by them."

This definition was adopted by this Court in *Downes v. Bidwell,* 182 U. S. 279.

A democracy Webster defines as:

> "A government by the people; a form of government in which the supreme power is retained and directly exercised by the people."

Cooley says of a republican form of government:

> "A government in the republican form; a government by representatives chosen by the people."
>
> *Cooley's Const. Lims.,* p. 194.

And see:

Minor v. Happersett, 21 Wall. 162;

In re Duncan, 139 U. S. 461, *supra;*

Jefferson Writings, vol. 15, p. 452, *supra.*

"A republican government is above all things representative government."

Burgess, Pol. Science and Compar. Const. Law, Vol. I.

In *Black's Constitutional Law,* at p. 28, the following distinction is drawn:

"The system of government in the United States and in the several states is distinguished from a pure democracy in this respect, that the will of the people is made manifest through representatives chosen by them to administer their affairs and make their laws, and who are intrusted with defined and limited powers in that regard, whereas the idea of a democracy, non-representative in character, implies that the laws are made by the entire people acting in a mass-meeting or at least by universal and direct vote."

"Representation is one of the very essentials of a republican form of government."

Bartlett Digest Election Cases, 446.

"Ours is a government of division and distribution of powers and authority. Ours is also a representative democracy; that is, it is republican in form of government as contradistinguished from a social or pure democracy on one hand and a government by the minority on the other, and excludes all others save and except one by the people through their selected representatives."

Ex parte Farnsworth, 135 S. W. 537.

Story says:

"In absolute governments the whole executive, legislative and judicial powers are, at least in their final result, exclusively confined to a single individual; and such a form of government is denominated a despotism, as the whole sovereignty of the state is vested in him. If the same powers are exclusively confided to a few persons, constituting a permanent sovereign council, the government may be appropriately denominated an absolute or despotic aristocracy. If they are exercised by the people at large in their original sovereign assemblies, the government is a pure and absolute democracy. But it is more common to find these powers divided, and separately exercised by independent functionaries, the executive power by one department, the legislative by another, and the judicial by a third; and in these cases the government is properly deemed a mixed one; a mixed monarchy, if the executive power is hereditary in a single person; a mixed aristocracy, if it is hereditary in several chieftains or families; and a mixed democracy or *republic*, if it is delegated by election, and is not hereditary." (Italics ours.)

1 Story on the Constitution, p. 388.

And see

Ex parte Anderson, 134 Cal. 74, *infra*.

Geo. H. Yeamans, in "The Study of Government", says of a pure democracy:

"It is natural and correct that, as above described and as generally understood, a pure democracy should be by common consent pronounced wholly impracticable for any but a very limited extent of territory, and to be, within that limited extent, a most fickle and turbulent government given alternately to the domination, often to the hates and passionate of tyranny, of factions. A better name would be simple democracy, or mass

democracy, without recourse to the offensive epithet of mobocracy."

It is apparent from the foregoing definitions that the direct exercise of the powers of government by the people at large would remove from a republic the feature which distinguishes it from a democracy. That government cannot be said to be representative in which the people at large are the legislators.

People v. Collins, 3 Mich. 343, 399;
State v. Swisher, 17 Tex. 441;
Rice v. Foster, 4 Harr. 479;
Ex parte Wall, 48 Cal. 279;
State v. Harris, 2 Bailey 598.

The principle of government by representatives elected by the people was the controlling factor that shaped the creation of our government. It was the main argument in justification of the proposed plan. It was the answer to the doubts of those who could see in a vast government by the people only turbulence and disorder and oppression. It was the reason for calling it a republic, "the compound republic of America".

Federalist, No. 51.

2.

IN ASCERTAINING THE MEANING OF THE PHRASE "REPUBLICAN FORM OF GOVERNMENT" THE DEBATES OF THE CONSTITUTIONAL CONVENTIONS AND THE FEDERALIST PAPERS ARE OF GREAT IMPORTANCE, IF NOT CONCLUSIVE.

It is a familiar rule of interpretation that contemporaneous construction receives great weight. This Court

has, from time to time, in construing the Federal Constitution, relied upon and attached much importance to the views of the framers of that instrument and to their exposition of the Constitution in debates and in the Federalist papers.

In *McCullough v. Maryland,* 4 Wheat. 419, Chief Justice Marshall said:

> "The argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the convention as manifested in the whole clause."

And in *Cohens v. Virginia,* 6 Wheat. 418, the Court, in assuming jurisdiction over a decision of the Supreme Court of Virginia, said:

> "Great weight has always been attached, and very rightly attached, to contemporaneous exposition.
>
> "No question, it is believed, has arisen, to which this principle applies more unequivocally than to that now under consideration. The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties, in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed" (referring, of course, to Hamilton and Madison).

In *Pollock v. Farmers' Loan & Trust Co.,* 158 U. S. 601, Chief Justice Fuller, speaking for the Court on rehearing of the decision in the income tax cases, after

an exhaustive examination of the position taken by the framers of the Constitution on the subject of direct taxation, concluded that portion of his opinion with the statement:

> "In our judgment the construction given to the constitution by the authors of the Federalist * * * should not and can not be disregarded." (p. 627.)

And see:

McPherson v. Blacker, 146 U. S. 1;
Rhode Island v. Mass., 37 U. S. 657.

3.

THE FRAMERS OF THE CONSTITUTION RECOGNIZED THE DISTINCTION BETWEEN THE REPUBLICAN AND DEMOCRATIC FORM OF GOVERNMENT, AND CAREFULLY AVOIDED THE LATTER.

In the Federal Convention of 1787 the distinction between a republican and democratic form of government was constantly in the minds of the framers of the Constitution. Steering between the despised absolutism of a highly centralized government or of a monarchy, on the one hand, and the fantastic government and evils of a pure democracy and the rule of the multitude on the other hand, the founders of our Government planted themselves on the principle of legislation by representatives, elected for that purpose, as the foundation of our institutions.

They were well aware of the dangers of democracy, they abhorred such a form of government. The Federalist papers and the debates of the Federal and State

Conventions at the time abundantly show that above all else the founders of the Government feared the creation of a government of men rather than a government of laws, and that the people of the nation in the first enjoyment of the powers of self-government would drift to that form which would insure license rather than liberty.

In No. 48 of the "*Federalist*" (XII *Hamilton's Works*, p. 28) Madison refers to a democracy

> "where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular, deliberate and concerted measures, to the intrigues of their executive magistrates"; and to a republic "where the executive magistracy is carefully limited both in the extent and in the duration of its power, and where the legislative power is exercised by an assembly * * *".

In the debates in the convention held in New York on the adoption of the Constitution, Hamilton said:

> "It has been observed by an honorable gentleman that a pure democracy, if it were practicable, would be the most perfect government. Experience has proved that no position in politics is more false than this. The ancient democracies in which the people themselves deliberated never possessed one feature of good government. Their very character was tyranny; their figure deformity. When they assembled the field of debate presented an ungovernable mob not only incapable of deliberation, but prepared for every enormity. In these assemblies the enemies of the people brought forward their plans of ambition systematically. They were opposed by the enemies of another party; and it became a matter of contingency whether the people subjected

themselves to be led blindly by one tyrant or by another."

Elliott's Debates, Vol. II, pp. 253-254.

Randolph, in the Federal Convention, observed that

"* * * the general object was to provide a cure for the evils under which the United States labored; that in tracing these evils to their origin, every man had found it in the turbulence and follies of democracy; that some check, therefore, was to be sought for against this tendency of our government, and that a good Senate seemed most likely to answer the purpose".

Ib., Vol. V, p. 138.

"The people immediately," said Sherman, "should have as little to do as may be about the government. They want information and are constantly liable to be misled."

Elliott's Debates, Vol. V, p. 136.

And Gerry said:

"The evils we experience flow from the excess of democracy. The people do not want virtue, but are the dupes of pretended patriots."

Ib., Vol. V, p. 136.

"The history of man clearly shows that it is dangerous to instrust the supreme power in the hands of one man. The same source of knowledge proves that it is not only inconvenient but dangerous to liberty for the people of a large community to attempt to exercise in person the supreme authority. Hence arises the necessity that the people should act by their representatives, but this method so necessary for civil liberty is an improvement of modern times."

Huntingdon—Elliott's Debates, Vol. II, p. 198.

And as Hamilton, in the Federal Convention, truly said, the members of the convention "most tenacious of "republicanism were as loud as any in declaiming "against the vices of democracy".

Ib., Vol. V, p. 202.

In No. 10 of the "*Federalist*" Madison points clearly to the evils and dangers of government directly by the people.

> "The instability, injustice, and confusion introduced into the public councils, have, in truth, been the moral diseases under which popular governments have everywhere perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamation.
>
> "* * * By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interest of the community."

He shows that there is grave danger to popular government from the rule of an uncontrollable majority, the members of which are largely swayed by personal interest.

> "When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. * * *

"From this view of the subject it may be concluded that *a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person,* can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducement to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

"*A republic, by which I mean a government in which the scheme of representation takes place,* opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union." (Italics ours.)

And see

Elliott's Debates, Vol. V, p. 242.

Wilson, in the Federal Convention, observed that

"Representation is made necessary only because it is impossible for the people to act collectively."

Ib., Vol. V, p. 160.

Ames, in the Massachusetts Convention, said:

"The people must govern by a majority, with whom all power resides. But how is the sense of this majority to be obtained? It has been said that a pure democracy is the best government for a small people who assemble in person. It is of small consequence to discuss it, as it would be inapplicable to the great country we inhabit. It may be of some use in this argument, however, to consider, that it would be very burdensome, subject to faction and violence; decisions would often be made by surprise, in the precipitancy of passion, by men who either understand nothing or care nothing about the subject; or by interested men, or those who vote for their own indemnity. It would be a government not by laws, but by men.

"Such were the paltry democracies of Greece and Asia Minor, so much extolled, and so often proposed as a model for our imitation. I desire to be thankful that our people are not under any temptation to adopt the advice. I think it will not be denied that the people are gainers by the election of representatives. They may destroy, but they cannot exercise, the powers of government in person, but by their servants *they* govern; they do not renounce their power; they do not sacrifice their rights; they become the true sovereigns of the country when they delegate that power, which they cannot use themselves to their trustees."

Elliott's Debates, Vol. II, p. 8.

John Marshall, in the Virginia Convention, said:

"I shall ask the worthy member only, if the people at large, and they alone, ought to make laws and treaties? Has any man this in contemplation? You cannot exercise the powers of government personally yourselves. You must trust to agents. * * *

"Can the whole aggregate community act personally? I apprehend that every gentleman will

see the impossibility of this. Must they, then, not trust them to others? To whom are they to trust them but to their representatives, who are accountable for their conduct?"

Elliott's Debates, Vol. III, pp. 225, 233.

4.

THE EXTENT OF TERRITORY OF THE STATES ALONE SUFFICED, IN THE JUDGMENT OF THE FRAMERS OF THE CONSTITUTION, TO CONDEMN THE ESTABLISHMENT OF A DEMOCRATIC FORM OF GOVERNMENT.

It was constantly being urged upon the framers of the Constitution that the large area of the United States made a republican form of government impracticable; that no large country had ever been ruled successfully by a popular government. The founders of the Constitution conceded the force of the objection as applied to the only popular form of government known to history; but they showed that it was inapplicable to popular government operating under the principle of representation.

Madison said:

"The error which limits republican government to a narrow district has been unfolded and refuted in preceding papers. I remark here only that it seems to owe its rise and prevalence chiefly to the confounding of a republic with a democracy, applying to the former reasonings drawn from the nature of the latter. The true distinction between these forms was also adverted to on a former occasion. It is, that in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents. A democracy, consequently, will be

confined to a small spot. A republic may be extended over a large region."

"The natural limit of a democracy is that distance from the central point which will just permit the most remote citizens to assemble as often as their public functions demand, and will include no greater number than can join in those functions; so the natural limit of a republic is that distance from the centre which will barely allow the representatives to meet as often as may be necessary for the administration of public affairs."

Federalist, No. XIV, *Hamilton's Works,* Vol. XI, pp. 101, 103.

"The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

"The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose."

Madison in *Federalist,* No. X *Ham. Works,* Vol. XI, p. 75.

And see paragraph IV, sec. 3, *supra,* paragraph IV, sec. 6, *infra.*

5.

THE FORM OF STATE GOVERNMENT PERPETUATED BY THE CONSTITUTION WAS THE REPUBLICAN FORM WITH THE THREE DEPARTMENTS OF GOVERNMENT, IN FORCE IN ALL THE STATES AT THE TIME OF THE ADOPTION OF THE CONSTITUTION.

The form of government provided by the Federal Constitution for the nation, and the perpetuation of which in each of the States underlies the Constitution, was the form of government known and practiced by the people of the Colonies and the States of the Confederation. It was intended that there should be a harmonious similarity between the new National Government and those created in the States. The Constitution guaranteed the continuance of that which was in operation. And, therefore, the guaranty of the Federal Constitution, in Article IV, Section 4, is to be interpreted in the light of the Governments in existence in the State when the Constitution was adopted.

> "Both governments", said Wilson, in the Federal convention, speaking of the national and state governments, "were derived from the people; both meant for the people; both, therefore, ought to be regulated on the same principles."
>
> *Elliott's Debates,* Vol. V, p. 239.

Bowdoin, in discussing the relation of the National to the State Governments, said:

> "Hence it follows that all the governments of the states in the Union ought to be of the same nature: of the republican kind; and that the general government ought to be an assemblage of the spirit and principles of them all. A short comparison pointing out the likeness of the general

to the particular constitutions may sufficiently elucidate the subject.

"All the constitutions of the states consist of three branches, except as to the legislative powers which are chiefly vested in two. The powers of government are separated in all and mutually check each other. These are laid down as fundamental principles in the Federal Constitution. All power is derived, mediately or immediately, from the people in all the constitutions. This is the case with the Federal Constitution. The electors of representatives to the state governments are electors of representatives to the Federal Government" *etc.*

Elliott's Debates, Vol. II, pp. 126-7.

And Madison, in establishing a criterion of a republican form of government, turned to the forms then in existence. He said:

"On comparing the Constitution planned by the Convention with the standard here fixed (*i. e.,* the existing state governments), we perceive at once that it is *in the most rigid sense* conformable to it."

Federalist, No. 39; *Ham. Works,* XI, 310.

How completely the framers of the Federal Constitution were guided by the institutions in existence in the States is pointed out in an article by Alexander Johnston, found in the appendix note to Chap. IV of Vol. I, Ed. 1906, of Bryce's "American Commonwealth".

"Not creative genius", it is there said, "but wise and discreet selection was the proper work of the Convention; and its success was due to the clear perception of the antecedent failures and successes and to the self-restraint of the members. The (presidential) electoral system was almost the

only feature of the Constitution not suggested by State experience" etc., etc.

And the learned author himself, speaking of the Colonies at the time of the adoption of the Constitution, says:

> "All were republicans managing their affairs by elective legislatures, attached to local self government. * * *"
>
> *Bryce, Am. Comm.,* Vol. I, Chap. III of Part I.

Tiedeman, at page 24 of his monograph on the "Unwritten Constitution of the United States", says:

> "The fundamental division of governmental powers into executive, legislative, and judicial, and their exercise by separate and independent departments of the government, form a striking characteristic of both the English and American constitutions. *Even before they had emerged from the colonial state, the Americans had adopted this doctrine,* and divided their local governments into executive, legislative, and judicial departments, conceding to each department the powers exercised by the corresponding department of the English government." (Italics ours.)

In all of the States the principle of representation lay at the foundation of the Government. Pendleton in the Virginia convention said:

> "When the bands of our former society were dissolved, and we were under the necessity of forming a new government, we established a constitution *founded on the principle of representation,* preserving therein frequency of elections and guarding against inequality of suffrage. I am one of those who are pleased with that Constitution, because it is built on that foundation."
>
> *Elliott's Debates,* Vol. III, p. 298.

It was, therefore, not a new idea that was being introduced to the American people. The Federal Constitution but continued the existing forms of government and was itself closely akin to them.

In *People v. Draper*, 15 N. Y. at p. 537, the Court said:

> "We must keep in mind that the constitution was not framed for a people entering into a political society for the first time, but for a community already organized, and furnished with legal and political institutions, adapted to all, or nearly all, the purposes of civil government; and that it was not intended to abolish these institutions, except so far as they were repugnant to the constitution then framed." Gray, J.

In *Ex parte Anderson*, 134 Cal. 74, Justice Van Dyke said:

> "The terms employed in framing a Constitution or in the enactment of laws by the legislature are to be construed *as they were generally understood at the time.* Our system of government is not that of a pure democracy, but it is a representative republic. This holds throughout, from the smallest subdivision, such as cities and towns, up through counties and states, to the federated or national government. The people, in their individual capacity, do not make or enforce laws to govern them, but they delegate the power to their agents to make laws, and also to construe and enforce them." (Italics ours.)
>
> "Every government", said Reverdy Johnson, "is republican in point of form which corresponds with the governments in existence when the constitution was adopted." See note in
>
> *II Story on the Constitution*, p. 592.

Calhoun said:

> "The forms of the governments of the several States composing the Union, as they stood at the time of their admission, are the proper standard by which to determine whether any afterchange in any of them makes its form of government other than republican." 6 Works, 219.

In a recent case the Supreme Court of Iowa expressed itself as follows:

> "The purpose of the federal Constitution was to provide a form of government, republican in character, for the states as a united whole. This is manifest from the history of the times, the contemporaneous writings and public addresses, the constitutional debates and the provisions of the instrument itself as adopted. And whatever may be the form of words employed by the lexicographers —and they are more or less varied—to define what is meant by the expression 'a republican form of government', it is clear that it was understood by the fathers to mean a government by the people, through representatives appointed by them to the various departments—executive, legislative, and judicial, as provided—either by direct vote or through some intervening officer or body by them selected and appointed by direct vote for the purpose. Now, at the time the constitution was adopted, as it is well known, there were in existence 13 states, each thereof supreme as related to its own domestic affairs, and in each of which the government was divided into three departments—executive, legislative, and judicial—and carried on through representatives selected from time to time by vote of the people."

Eckerson v. City of Des Moines, 115 Northwestern 177-*181*; 137 Ia. 452.

In *Minor v. Happersett*, 21 Wall. 162, the meaning of the federal guaranty of a republican form of government was explained as follows:

> "The guaranty is of a republican form of government. * * * All the states had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. *Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.*" (Italics ours.)

6.

THE HISTORY OF OTHER NATIONS DOES NOT FURNISH THE DEFINITION OF THE PHRASE "REPUBLICAN FORM OF GOVERNMENT" AS THOSE WORDS WERE USED BY THE FRAMERS OF THE CONSTITUTION. THEY DISTINGUISHED THE AMERICAN FROM ALL OTHER REPUBLICS BY THE INTRODUCTION OF THE PRINCIPLE OF REPRESENTATION.

Speaking of the difference between the government of the ancient republics and that proposed in the Constitution, the author of Federalist paper No. 63 said:

> "The true distinction between these and the American government lies in the total exclusion of the people in their collective capacity from any share in the latter."
>
> *XII Hamilton's Works*, p. 141.

In No. 39 of the *Federalist*, Madison said, after referring to various nations whose governments had been denominated republics:

"These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions."

And he says:

"We may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."

Federalist, No. 39, XI *Hamilton's Works,* p. 309.

As Sir Henry Maine points out, there was but little comfort for the founders of our Government in the history of republics. The authors of the "Federalist" were, as he says,

"deeply troubled by the ill success and ill repute of the only form of government which was possible for them. The very establishment of their independence had left them a cluster of republics in the old sense of the word, and, as hereditary kingship was out of the question, their federal constitution was necessarily republican. They tried to take their own republic out of the class as commonly understood. What they chiefly dreaded was disorder, and they were much impressed by the turbulence, the 'fugitive and turbulent existence' of the ancient republics. But these, they said, were not republics in the true sense of the name. They were 'democracies', commonwealths of the primitive type, governed by the vote of the popular assembly, which consisted of the whole mass of male citizens met together in one place. *The true republic must always be understood as a commonwealth*

saved from disorder by representative institutions." (Italics ours.)

Maine's Popular Government, Essay IV, Const. U. S., pp. 198-199.

By introducing the principle of representation into the form of democracy they adopted a type of government new to history which they called "republican", and which, as has been shown, was in use in all of the States at the time the Constitution was written.

> "It was a long and varied experience in *representative forms* which laid the foundation of the theory of government adopted by the framers of the Constitution. Unappalled by the scepticism of European kings they proceeded to extend their self-government over regions which in all previous ages had been esteemed too vast for republican rule." (Italics ours.)
>
> *Bancroft Hist. of U. S.,* Vol. IX, p. 259.

Hamilton, in No. 9 of the *Federalist,* conceded that the petty republics of Greece and Italy had been utter and complete failures.

> "If," he said, "it had been found impracticable to have devised a more perfect structure, the enlightened friends to liberty would have been obliged to have abandoned the cause of that species of government as indefensible. The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood which were either not known at all or imperfectly known to the ancients. The regular distribution of power in the distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature

by deputies of their own election, these are wholly new discoveries, or have made their principal progress towards perfection in modern times."

XI Hamilton's Works, p. 61.

The debates respecting the adoption of the Constitution show that much of the hostility to the proposed government was based on the experience of those nations which had without success attempted a popular form of government.

Mason, whose opposition to the Constitution was consistent, urged that a republic was impossible in this country. He said:

"It is ascertained, by history, that there never was a government over a very extensive country without destroying the liberties of the people. History also, supported by the opinions of the best writers, shows us that monarchy may suit a large territory, and despotic governments ever so extensive a country, but that popular governments can only exist in small territories. Is there a single example, on the face of the earth, to support a contrary opinion? Where is there one exception to this general rule? Was there ever an instance of a general national government extending over so extensive a country, abounding in such a variety of climates, &c., where the people retained their liberty."

Elliott's Debates, Vol. III, p. 30.

But a few references to the debates of the Federal and State conventions of 1787-8 will clearly show that the founders of our Government relied on representation in government to save this republic from the fate of previous republics; more than any other feature in

the proposed plan, the principle of representation led to its adoption.

Wilson, a member of the Federal Convention, and who with great success explained the Federal Constitution to the Pennsylvania Convention, pointed out that the ancient republics were not the model for the government which the people were forming. He said:

> "One thing is very certain—that *the doctrine of representation in government was altogether unknown to the ancients.* Now, the knowledge and practice of this doctrine is, in my opinion, essential to every system that can possess the qualities of freedom, wisdom and energy." (Italics ours.)
>
> • • •
>
> "For the American states were reserved the glory and the happiness of diffusing this vital principle throughout the constituent parts of government. Representation is the chain of communication between the people and those to whom they have committed the exercise of the powers of government."
>
> *Elliott's Debates,* Vol. II, pp. 423, 424.

John Marshall, in the Virginia Convention, said:

> "The extent of the country is urged as another objection, as being too great for a republican government. This objection has been handed from author to author, and has been certainly misunderstood and misapplied. To what does it owe its source? *To observations and criticisms on governments, where representation did not exist.*" (Italics ours.)
>
> *Elliott's Debates,* Vol. III, p. 232.

> "Animadverting on Mr. Henry's observations, that the French had been the instruments of their own slavery, that the Germans had enslaved the

Germans, and the Spaniards the Spaniards, &c., he asked if those nations knew anything of representation. The want of this knowledge was the principal cause of their bondage."

Corbin, Virginia Convention. *Elliott's Debates,* Vol. III, p. 417.

Hamilton, in the New York Convention, said:

"Mr. Chairman, it has been advanced as a principle, that no government but a despotism can exist in a very extensive country. This is a melancholy consideration indeed. If it were founded on truth, we ought to dismiss the idea of a republican government, even for the state of New York. This idea has been taken from a celebrated writer, who by being misunderstood, has been the occasion of frequent fallacies in our reasoning on political subjects. But the position has been misapprehended; and its application is entirely false and unwarrantable; it relates only to democracies, where the whole body of the people meet to transact business, and where representation is unknown. Such were a number of ancient and some modern independent cities. Men who read without attention have taken these maxims respecting the extent of country, and, contrary to their meaning, have applied them to republics in general."

Elliott's Debates, Vol. II, p. 352.

At another time, Hamilton concisely and clearly explained each of the so-called republican confederacies, to wit: the Amphictyonic, the Dutch, the Germanic, the Lycian and Achaean, and said:

"No inference can be drawn from these examples, that republics cannot exist; we only contend that they have hitherto been founded on false principles."

Elliott's Debates, Vol. II, p. 235.

In the Massachusetts Convention, one of the delegates illustrated by reference to the history of Sparta, Athens and Rome, that republics soon degenerated into aristocracies. The fall of the Amphictyonic League was referred to. Gorham replied "that hypotheses could " not be drawn from the ancient Governments", *"for " those Governments had no idea of representations as " we have."* (Italics ours.)

Elliott's Debates, Vol. II, p. 69.

Monroe, answering criticisms based on references to history, said:

> "Let us see how far these positions are supported by the history of these leagues, and how far they apply to us. The Amphictyonic council consisted of three members,—Sparta, Thebes and Athens. What was the construction of these states? Sparta was a monarchy more analogous to the Constitution of England than any I have heard of in modern times. Thebes was a democracy, but on different principles from modern democracies. *Representation was not known then. This is the acquirement of modern times."* (Italics ours.)
>
> Virginia Convention. *Elliott's Debates,* Vol. III, p. 209.

Zachariah Johnson, in the same convention, said:

> "As to the principle of representation, I find it attended to in this government in the fullest manner. It is founded on absolute equality."

Pointing out how the principle appears in the proposed Constitution, he continued:

> "• • • when I review all these things • • • I plainly see a security of the liberties of this country, to which we may safely trust. *Were this*

> *government defective in this fundamental principle of representation, it would be so radical that it would admit of no remedy.''* (Italics ours.)
>
> *Elliott's Debates,* Vol. III, pp. 644, 645.

Pinckney, one of the ablest delegates in the Federal Convention, showed that the Governments in the States of the Confederation, and not historical precedents, furnished the type of republic perpetuated by the Constitution.

> "All the States", he said, "had adhered in their forms to the republican principle, though they have differed widely in their opinions of the mode best calculated to preserve it."

He reviewed the Government of each of the States, and said:

> "All the republics we read of, either in the ancient or modern world, have been extremely limited in territory. We know of none a tenth part so large as the United States; indeed, we are hardly able to determine from the lights we are furnished with, whether the governments we have heard of under the names of republics really deserved them, or whether the ancients ever had any just or proper ideas upon the subject. *Of the doctrine of representation, the fundamental of a republic, they certainly were ignorant.* If they were in possession of any other safe or practicable principles, they have long since been lost and forgotten to the world." (Italics ours.)
>
> *Elliott's Debates,* Vol. IV, pp. 325-6.

As has been well said by Francis Lieber, the framers of our Constitution established a

> "representative national government"; "the highest national polity yet developed", * * * "equally distant from the market place republic of old and

the despotism of Asia or Europe, from absorbing centralism and dissolving communism", &c.

Miscellaneous Works, Ed. 1881, Vol. II, p. 225.

It is not to be disputed that the term "republic" has been used with widely varying meanings. Two propositions, however, are clear: 1. That by a republican form of government the founders of our country meant a popular or democratic form operating under the principle of representation, this being the cardinal republican feature. 2. That the word "republican" in the Constitution must be given the meaning which the framers of the Constitution understood it to have.

At the same time the weakness of representative government was thoroughly appreciated in the Federal Convention and it was well understood that corruption is inseparable from a republican form of government.

Hamilton *"Federalist"*, No. 62; *Ham. Works,* XII, p. 128.

"In Massachusetts", said Gerry, "the worst men get into the legislature."

Elliott's Debates, Vol. V, p. 160.

Mason said:

"It was to be considered that no government was free from imperfections and evils; and that improper elections in many instances were inseparable from republican governments. But compare these with the advantages of this form in favor of the rights of the people—in favor of human nature."

Ib., p. 161.

Mercer called attention to the fact that:

> "The corruption and unstability of the legislative councils of the States had led to the appointment of the Convention."
>
> *Ib.*, p. 424.

Manifestly the makers of the Constitution considered the dangerous abuses of government directly by the people worse than the evils of misrepresentation which it is claimed can be overcome by direct legislation.

It is further to be observed that direct legislation was not unknown to the framers of the Constitution.

It had been practiced consistently in the town meetings of the municipalities of Massachusetts and of other States. Nothing was better known to the founders of our Government.

See:

Ex parte Pfahler, 150 Cal. 71; 88 Pac. 273;
In re Municipal Suffrage to Women, 160 Mass. 586; 36 N. E. 488.

See, also, Daniel Webster's argument in *Luther v. Borden,* 7 How. 1.

But the Federal Constitution recognizes only one method of exercising the state legislative powers, *i. e.,* by State Legislatures. The views of the members of the Federal Convention on the evils of democracy, demonstrate that they condemned legislation by the people with singular unanimity. And the existence of direct legislation in municipal affairs lends significance to its studied elimination from the Governments devised for the States and the Nation.

7.

INITIATIVE LEGISLATION IS INVALID BECAUSE GOVERNMENT BY THE PEOPLE DIRECTLY IS INCONSISTENT WITH OUR FORM OF GOVERNMENT.

It has been shown that the vital element in a republican form of government, as that phrase is used in American political science, is *representation.* Legislation by the people directly is the very opposite, the negative of this principle. It can, therefore, have no place in our form of government. Indeed, it has been repeatedly said to be contrary to and subversive of the structure of our republic.

See the language of the Court in *In re Duncan, supra,* quoted herein at page 25.

In *State v. Swisher,* 17 Tex. 448, 449, it was said:

> "But, besides the fact that the Constitution does not provide for such reference to the voters to give validity to the acts of the legislature, we regard it as repugnant to the principles of the *representative government* formed by our Constitution. Under our Constitution, the principle of lawmaking is that laws are made by the people, not directly, but by and through their chosen representatives. By the act under consideration, this principle is subverted, and the law is proposed to be made at last by the popular vote of the people, leading inevitably to what was intended to be avoided, confusion and great popular excitement in the enactment of laws." (Italics ours.)

There is no finer exposition of the repugnancy of direct legislation by the people to our form of govern-

ment than that contained in the opinion of Justice Booth, in the case of

Rice v. Foster, 4 Harr. (Del.) 479.

The following is from the language of that case:

"The proposition that an act of the legislature is not unconstitutional, unless it contravenes some express provision of the constitution, is, in the opinion of this court, untenable. * * * So also an act is void, if it palpably violates the principles and spirit of the constitution, or tends to subvert our republican form of government. Of this character, it is contended, is the act of the legislature of the nineteenth of February, 1847.

"The powers of government in the United States are derived from the people, who are the origin and source of sovereign authority. The framers of the Constitution of the United States, and of the first constitution of this State, were men of wisdom, experience, disinterested patriotism, and versed in the science of government. They had been taught by the lessons of history, that equal and indeed greater dangers resulted from a pure democracy, than from an absolute monarchy. Each leads to despotism. *Wherever the power of making laws, which is the supreme power in a State, has been exercised directly by the people under any system of polity, and not by representation, civil liberty has been overthrown.* Popular rights and universal suffrage, the favorite theme of every demagogue, afford, without constitutional control or a restraining power, no security to the rights of individuals, or to the permanent peace and safety of society. In every government founded on popular will, the people, although intending to do right, are the subject of impulse and passion; and have been betrayed into acts of folly, rashness and enormity, by the flattery, deception, and influence of demagogues. A triumphant majority oppresses the mi-

nority; each contending faction, when it obtains the supremacy, tramples on the rights of the weaker; the great aim and objects of civil government are prostrated amidst tumult, violence and anarchy; and those pretended patriots, abounding in all ages, who commence their political career as the disinterested friends of the people, terminate by becoming their tyrants and oppressors. History attests the fact, that excesses of deeper atrocity have been committed by a vindictive dominant party, acting in the name of the people, than by any single despot. In modern times, the scenes of bloodshed and horror enacted by the democracy of revolutionary France, in the days of her short-lived misnamed republic, shocked the friends of rational liberty throughout the civilized world. There, in the midst of the most refined and polished nation of Europe, the guillotine dispensed with the forms of law as unmeaning pageants; and, under the capricious mandates of popular frenzy, running wild in pursuit of the phantom of a false licentious liberty, 'suspicion filled their prisons and massacre was their gaol delivery'.

"In the convention of 1787, which formed the Constitution of the United States, the spirit of insubordination, and the tendency to a democracy in many parts of our country, were viewed as unfavorable auguries in regard both to the adoption of the Constitution, and its perpetuity. The members most tenacious of republicanism, were as loud as any in declaiming against the vices of democracy. Mr. Gerry, of Massachusetts, the friend and associate of Mr. Jefferson, thought it 'the worst of all political evils'. The necessity of guarding against its tendencies, in order to attain stability and permanency in our government, was acknowledged by all. Even the propriety of electing by an immediate vote of the people, the first branch of the national legislature was seriously questioned by some of the ablest members and warmest advocates of a repub-

lican form of government. * * * In the debates on the Federal Constitution in the Virginia convention, Mr. Madison, always the advocate of popular rights, subject to the wholesome restraints of law, remarked, 'that turbulence, violence and abuse of power by the majority trampling on the rights of the minority, have produced factions and commotions; and that these in republics, more frequently than any other cause, have produced despotism'. 'If', he observes, 'we go over the whole history of ancient and modern republics, we shall find their destruction to have generally resulted from those causes. If we consider the peculiar situation of the United States, and go to the sources of that diversity of sentiment which pervades its inhabitants, we shall find great danger to fear that the same causes may terminate here, in the same fatal effects which they produced in those republics.' *To guard against these dangers and the evil tendencies of a democracy, our republican government was instituted by the consent of the people.* The characteristic which distinguishes it from the miscalled republics of ancient and modern times, is, that none of the powers of sovereignty are exercised by the people; but all of them by separate, co-ordinate branches of government in whom those powers are vested by the Constitution. These co-ordinate branches are intended to operate as balances, checks and restraints, not only upon each other, but upon the people themselves; to guard them against their own rashness, precipitancy and misguided zeal; and to protect the minority against the injustice of the majority." (Italics ours.)

In discussing the legality of the referendum, the Supreme Court of Michigan, in forcible language, demonstrated the inconsistency of direct intervention by the people, with our form of government:

"The power of enacting general laws cannot be delegated—not even to the people. There is nothing in the Constitution which authorizes or contemplates it; nothing in the nature of the power which requires it; nothing in the usages of our American government which sanctions it; no single adjudication of a court of last resort, in any State, which affirms it; and such delegation would be contrary to the intent manifested by the very structure of the legislative department of the Government.

"While the power and the responsibility of legislation remain where the Constitution has placed them, before any proposed measure can become a law it must first struggle for ascendency at the ballot box, amid the numerous issues involved in all political contests. *It must pass through the ordeal of public and deliberate discussion in the legislature.* It must receive the sanction of the concurrent vote of a majority, or, having been returned with the governor's veto, of two-thirds of the members of the two houses of which the legislature is composed—votes cast by men who are not the mere deputies of their immediate constituents, but the representatives of the whole people, and bound to act for the general good; who are responsible to the people for their action, and may be held to that responsibility. Public opinion will prevail, and pass into public law; but it will be enlightened, deliberate, permanent and organically expressed public opinion. It is this opinion alone which the constitution designed should govern. *Such a government secures deliberation and responsibility in legislation, and affords protection against the despotism of official rulers on the one hand, and of irresponsible, numerical majorities on the other.* It has been appropriately termed 'the flower of modern civilization'.

"But if the legislature may transfer this power and this responsibility to the people, where are the checks which the constitution intended to provide

against hasty and inconsiderate legislation? Where are the securities against arbitrary and irresponsible power? We may be subjected to the dominion of the popular majority of the hour—*a majority whose opinion must be formed without legislative discussion or deliberation*—a majority responsible to no one, because it has no superior—impatient of restraint, because conscious of its strength, and apt to think itself infallible, and against whose resistless will, thus exercised directly on matters of legislation, with an elective judiciary, all the restraints which the constitution has imposed upon legislative power will, in the end, prove utterly unavailing. In short, if this power may be delegated to the people, then, by the action of one of its departments, this *representative* government may be transformed into a collective democracy, the only such democracy practicable where the people are too numerous to assemble *en masse,* namely, a democracy in which a select body propose the laws, and the people adopt or reject them."

The People v. Collins, 3 Mich. Rep. 416, 417.

And in the same case the Court asked:

"Can it be possible that any man of mature years believes that, under our representative system of government, statute laws can be constitutionally enacted in this way? And can it be possible that any American citizen, out of a mad house, is desirous, even in a legal manner, of establishing in this country such a system of government?" (p. 368.)

* * * * * * *

Again:

"And before closing, I feel it my duty to say, that I deeply regret the evils sought to be removed by the act before us; but, great as these evils are, and as much to be deplored and deprecated as they may be, I had much rather be compelled to

witness their continuance in the land for years yet to come, than to see our constituted system of representative government perverted, and a collective democracy established, by an assumption of arbitrary, unconstitutional power, on the part of the legislature, and a ratification of such assumption by the people."

The People v. Collins, 3 Mich. 399.

In *Thorne v. Cramer,* 15 Barb. 112, the Court, holding that the Legislature could not delegate its powers of legislation and submit to the voters of the State the question whether an act to establish free schools should become a law, said:

> The doctrine that no harm can result from allowing the people to exercise, directly, the law-making power, is more plausible than sound. If it were a legitimate subject for investigation at this time, we think it might be easily shown, that some of the very worst evils must necessarily flow from such a violation of the fundamental law. The constitution has wisely deposited the legislative power in the hands of a limited number of chosen men. This is done, partly, because of the impracticability of having laws passed in a mass assemblage of the people; and, partly, because it is supposed that the chosen representatives will be better qualified for the duty than a considerable portion of the electors. It is hardly necessary to say, that many voters are not in all respects qualified to become governors or legislators. They may have discretion enough to select suitable men for those offices; but if they were put directly to the business of framing laws themselves, they would be quite out of their element. Can we not then foresee dangers to arise from a delegation of the legislative franchise, even to the people themselves?" (p. 117.)

On page 118 the Court said:

> "According to the theory of constitutional governments all power is inherent in the people. They are the original sovereigns. Before the establishment of a regular government they exercise the power in their native capacities. They themselves not only make, but administer the laws. They enact; they adjudge; they execute. For, in that state of nature, *might* makes *right; and majorities are, of course, omnipotent and despotic.* But when the people frame a constitution to live under, they yield up certain natural, personal rights, and consent that those yielded rights shall, thenceforth, be exercised only by certain selected persons, in a prescribed manner."

The subject was exhaustively examined in *People v. Parker,* 6 Barr. 507. The Court said at page 512:

> "But though it was thus proclaimed, that the sovereign power resided in the body of the people, and that the only legitimate end of government is the promotion of their welfare, *the utter impracticability of a personal and immediate exercise of this power by them,* in the administration of the affairs of government, *forbade the idea of a pure democracy.* * * * But had these reasons been wanting, other important objections would have interposed to prohibit the immediate exercise of administrative authority by the mass of the community acting directly on the subject. Among these may be mentioned the necessarily uncertain and fluctuating character of popular decisions, induced by the excitement of collision, and often by unreasoning passion and prejudice; the violent commotions to which popular assemblies are constantly exposed, especially when acting under the influence of party zeal, inflamed by the seductions of factious eloquence and artful sophistry; the difficulty, if not impossibility, of deliberation and consultation, and

above all, the imminent danger that, in the absence of a sense of responsibility, the surest guaranty of social justice, the rights of the minority would be disregarded by a majority seeking only the gratification of its own desires, or the advancement of its peculiar opinions. In discussing proposed schemes of government, these objections had not escaped the public attention, of which the public debates of that day give ample evidence."

Referring to Madison's fear of the abuse of power by the majority, the Court added:

"This was but an expression of the prevailing sentiment. In accordance with it, though all the written constitutions framed by the several states of the confederacy acknowledged the sovereignty to reside in the mass of the people, its exercise by them was, either expressly or by necessary implication, confined to the establishment of the Constitution, the amendment of its defects, the correction of the abuses of government, and the choice of public servants."

Commenting upon the amended Constitution of 1835, which re-established the General Assembly, consisting of a Senate and House of Representatives, the Court said that the vote of the people conclusively showed

"that the experience of nearly half a century had worked no change in the sentiment which lodged the legislative authority of the commonwealth in selected and responsible bodies of men, liable to the animadversion of their constituents, as the only safe depository of this portion of the sovereign power."

Again, on page 516:

"*An attempt to do so (i. e., lodge legislative power directly with the people) would be not only*

to disregard the constitutional inhibition, but tend directly to impress upon the body of the state those social diseases that have always resulted in the death of republics, and to avoid which the scheme of a representative democracy was devised and is to be fostered. Athens once possessed a government in a measure representative; but the decrees of its senate were subject to the supervision of the popular assemblies of the citizens, who, by progressive innovations, entirely changed the nature of the constitution, and introduced corruption, anarchy, and final destruction." (Italics ours.)

The referendum was thus criticized by the Court, in speaking of the executive and legislative departments:

"Nor can they call to their aid the mass of the community, except in the modes prescribed by the fundamental law. To permit either of these courses, would be to loosen the hold of society from its greatest safety, by removing all accountability, and *thus subjecting the minority to the unrestrained decisions of irresponsible and fluctuating majorities.* In the present instance, the good proposed by the act of Assembly may blind the unreflecting to the ultimate consequences of the false principle upon which it proceeds; but the most indifferent and unobservant cannot but be startled by the reflection, that it is a principle capable of universal operation in the business of legislation, and may be in the end employed to procure the establishment of laws which a responsible legislature would not dare to enact. * * * (p. 519.)

" * * * If the two houses can divest themselves of their office of law-makers, and devolve it upon the body of the people, what security have we against the passage of laws, perhaps well meant, but liable to be glaringly wrong, because inconsiderately adopted? And what check is left us upon hasty and ill-advised zeal, open to be influenced

> and misguided by interested, cunning, or blind fanaticism? If the practice be sanctioned, there may follow a train of experiments which, unarrested at some point of their progress, must end in the final overthrow of the constitution. Every case of doubtful propriety will be referred to the result of a ballot; and acts of Assembly, subject to the popular vote, will be yielded to unthinking clamor or partisan importunity, by faithless legislators anxious to escape the responsibility of their position."

It was urged that there was some precedent which had legitimized the submission of legislative questions to the popular vote. Of this reasoning the Court said:

> "In questions of mere property, an inveterate error, which, by repetition, has attained to the dignity of a rule, may be tolerated: because an attempt to correct it would generally be productive of more mischief than will be worked by its continuance. But such an argument can have no place where the error committed touches, with the finger of corroding wrong, the political organization of a state and threatens its existence. In such a case, the duty of preserving the constitution intact is paramount to every other, and, irrespective of veteran abuses, so imperatively calls for the eradication of the canker, that the judiciary, which should shrink from applying the appropriate corrective, would be justly chargeable with a gross dereliction of duty."

Chief Justice Gibson, in the case of the *Borough of West Philadelphia,* 5 Watts & Serg. Rep., 283, said:

> "Under a well-balanced constitution, the legislature can no more delegate its proper function than can the judiciary. It is on the preservation of the lines which separate the cardinal branches of the government, that the liberties of the citi-

> zen depend; for a consolidated sovereignty, in whatever form, is a despotism in so far as it subjects the governed, not to prescribed rules of action, to which he may safely square his conduct beforehand, but to the unsettled will of the ruling power, which cannot be foreseen; and a government becomes consolidated in proportion as its legislative branch abandons its own functions, or usurps those which have been vested elsewhere. *In the very constitution of things, the whole people of a State cannot assemble together to exercise their sovereign power in person;* and it is not to be regretted that they cannot, for their rule being untrammeled by anything but their own will, would be as arbitrary and fitful in its exercise as any other uncontrolled domination." (Italics ours.)

Chief Justice Denio, in *Clarke v. City of Rochester,* 28 N. Y. 606, 633, said:

> "The government organized by the Constitution was considered to be, as it undoubtedly is, that of a *representative republic,* and no power existed in the Legislature to convert it on any occasion, or for any purpose, into a *pure democracy.* The organization of the law-making power is one of the principal purposes of a constitutional charter of government, and in all communities of considerable extent, this must be effected by means of a system of representation, by which the people at stated periods delegate to citizens chosen by them the power of enacting general laws, by which all the members of the State are to be governed."

We leave this branch of the discussion with an extract from the concurring opinion of Justice Harrington in *Rice v. Foster (supra):*

> "Gloomy indeed would be the prospect for this or any other representative republic, if the people

themselves should ever withdraw this power from their representatives, to exercise it through the medium of legislative ballot-boxes. All history teaches, not only that this would lead to anarchy and despotism; but that it is itself a state of anarchy. Fortunate it is for us, that our wise and patriotic ancestors, have interposed between us and such a state, the restraints of the constitution; which neither the judiciary, nor the legislature, nor the people themselves, will ever disregard, when the true principles of the constitution come to be considered, and fully understood."

8.

THE WELL-KNOWN PRACTICES OF (a) ADOPTING STATE CONSTITUTIONS BY POPULAR VOTE, AND OF (b) LOCAL LEGISLATION IN "TOWN MEETINGS" FURNISH NO PRECEDENT FOR THE LODGMENT OF LEGISLATIVE POWER IN THE BALLOT-BOX.

(a) Subject to the Federal Constitution, the people of the several States may make their own constituent laws, and the amendment of State Constitutions is properly the subject of popular vote. But constitutional amendments are alterations of the social compact pursuant to which government is conducted and legislation is enacted. Framing the constituent law is not legislation.

Dicey, Law of the Constitution, (Chap. 2, Part I.)

The adoption of the Federal Constitution was not legislation; neither is the adoption by the people of the States of their organic law. The people of this country define by constitutional provisions the limits within which, and the subjects over which, the legislative power

may extend. It is proper that they should do so by popular vote. It is a part of the compact which, backed by the force of the majority, lies at the root of all free government. That compact is the protection of the minority.

See

Thorne v. Cramer, supra;

People v. Parker, supra;

Daniel Webster's argument in Luther v. Borden, supra.

(b) Nor does the practice of legislating directly in municipal affairs furnish a precedent. It has been pointed out that nothing is more firmly engrafted on the institutions of this country than the practice of conducting the business of municipalities by assemblies of the voters.

Speaking of the State Constitutions, the Supreme Court of Massachusetts said:

> "The characteristic feature of all these Constitutions is that they establish a government by representatives of the people, and not a government directly by the people. This was the kind of government to which the people were accustomed. • • • While a purely democratic form of government existed in the towns of New England, few, if any, persons seem to have been in favor of such a form of government for the State."

In re Municipal Suffrage to Women, 160 Mass. 586; 36 N. E. 488.

In *Ex parte Pfahler*, 150 Cal. 71; 88 Pac. 273, the Court said:

> "It is clear that the direct participation of the electors of subdivisions of a state in legislation as to local affairs was never intended to be prohibited by the framers of the Federal Constitution, or the states adopting the same, and that such power has been exercised by them, where not inconsistent with provisions of their state constitution, in innumerable instances, from the institution of our government to the present day, without interference of any kind on the part of the federal government.
>
> "As is universally recognized by courts and writers on constitutional law, it must be assumed that there was nothing in any of the forms of government prevailing in the various states at the time of the adoption of the Constitution that was violative of the provisions under discussion. * * * *The constitutional provision was framed and adopted with full knowledge of this system of local government that then obtained in four of the states, and that system was continued under the Constitution, without any question as to its validity.*" (Italics ours.)

A purely democratic form of town government has never been considered inconsistent with a republican form for the central government of the States. As explained by Madison, the divergence in area would alone suffice for the difference between the success of the first and the failure of the latter.

It was often said that the greater a mass of voters, the more unruly and the more easily influenced by passion and prejudice, by demagogism, by factional hatred and ill-will, by the evils that characterize pure democracy. That these forces should find greater room for play in a

plebiscite by the voters of a State than in a meeting of townspeople is evident. For these reasons, we find the forms of pure democracy in town governments well established in our polity at once with the forms of republicanism in the States and in the government of the United States.

Finally, there is little similarity between the town governments of New England and government by the ballot. The New England town governments were based on the direct participation of citizens in the deliberations over the proposal and enactment of laws.

As is pointed out by Justice McKinstry, in *Ex parte Wall,* 48 Cal. 279, at p. 322, in speaking of a statute providing for the enactment of laws by popular vote:

> "There is no provision for an assemblage of the people of the town for deliberation; the vote to be taken can in no way be said to express the result of such deliberation. The Constitution intended that the opinion of a majority should govern as to town matters, but that it should be an 'organically expressed' opinion. * * * The statute under consideration simply permits a species of plebiscitum with reference to a particular subject in which the only option of the people of a township is to say 'yes' or 'no' to a complicated project. * * * This statute furnishes neither a system nor a government. * * * *That cannot be called a system of town government in which no deliberative assemblage is provided for,* and in which a local law is adopted by the ballots of perhaps a bare majority who vote secretly and without consultation with the rest of the voters; who are actuated by motives which need not be publicly avowed or controlled by reasons the weakness of which would be exposed by a public discussion." (Italics ours.)

V.

THE FEDERAL CONSTITUTION PRESUPPOSES IN EACH STATE THE MAINTENANCE OF A REPUBLICAN FORM OF GOVERNMENT AND THE EXISTENCE OF STATE LEGISLATURES, TO WIT: REPRESENTATIVE ASSEMBLIES HAVING THE POWER TO MAKE THE LAWS; AND THAT IN EACH STATE THE POWERS OF GOVERNMENT WILL BE DIVIDED INTO THREE DEPARTMENTS: A LEGISLATURE, AN EXECUTIVE AND A JUDICIARY. ONE OF THESE, THE LEGISLATURE, IS DESTROYED BY THE INITIATIVE.

1.

STATE LEGISLATURES ARE A VITAL FEATURE OF OUR GOVERNMENT; THE FEDERAL CONSTITUTION PRESUPPOSES THEIR EXISTENCE AND IMPOSES ON EACH STATE THE OBLIGATION TO MAINTAIN THEM.

It was a natural result of the views taken by the framers of the Constitution that the Federal Government should have been founded on the existence in each of the States of a form of government embodying the principles of a true republic. This involved the maintenance of representative legislative assemblies.

The history of the clause of the Constitution providing for the election of senators affords ample evidence that the framers of the Constitution designedly provided for the perpetuation of the State Legislatures. It was only after much debate that it was finally resolved to have the senators chosen by the Legislatures.

During the discussion of the method of electing the members of the House of Representatives Pinckney moved that the "members of the first branch be appointed in such manner as the several State Legisla-

" tures shall direct". Madison and others opposed the motion and Hamilton said:

> "It is essential to the democratic rights of the community that this branch be directly elected by the people. Let us look forward to probable events. *There may be a time when state legislatures may cease; and such an event ought not to embarrass the national government.*"
>
> *Elliott's Debates,* Vol. I, p. 433.

Pinckney's motion was lost. A few days later when the debate was on Randolph's fourth resolution providing for the election of United States senators by the Legislatures of the States, Wilson and others maintained that this arrangement again would make the general Government absolutely dependent upon the continuance of the State Governments.

Elliott's Debates, Vol. I, p. 446.

Elsworth, *contra,* argued:

> "The state legislatures are more competent to make a judicious choice than the people at large. Instability pervades their choice. In the second branch of the general government, we want wisdom and firmness."
>
> *Elliott's Debates,* Vol. I, p. 446.

The resolution passed in the affirmative on the same day.

Elliott's Debates, Vol. I, p. 447.

The effect of this and other provisions as was pointed out during the numerous debates on the adoption of the Constitution was that the Legislatures of the States became vital parts of our scheme of government.

Davie, one of the delegates to the Federal Convention observed:

> "Every part of this federal government is dependent on the constitution of the state legislatures for its existence." • • •
>
> "The Federal Convention were as well convinced as the members of this house, that the state governments were absolutely necessary to the existence of the federal government. They considered them as the great massy pillars on which this political fabric was to be extended and supported; and were fully persuaded that, when they were removed, or should moulder down by time, the general government must tumble into ruin. A very little reflection will show that no department of it can exist without the state governments."
>
> *Elliott's Debates,* Vol. IV, pp. 59, 58.

Iredell said:

> "The very existence of the general government depends on that of the state governments. The state legislatures are to choose the senators. Without a Senate there can be no Congress. The state legislatures are also to direct the manner of choosing the President. Unless, therefore, there are state legislatures to direct that manner, no President can be chosen. The same observation may be made as to the House of Representatives, since, as they are to be chosen by the electors of the most numerous branch of each state legislature, if there are no state legislatures there are no persons to choose the House of Representatives. Thus it is evident that the very existence of the general government depends on that of the state legislatures, and of course, that their continuance cannot be endangered by it."
>
> *Elliott's Debates,* Vol. IV, p. 53.

Pendleton, in the Virginia Convention, observed:

> "Unless, therefore, there be state legislatures to continue the existence of Congress, and preserve order and peace among the inhabitants, this general government, which gentlemen suppose will annihilate the state governments, must itself be destroyed."
>
> *Elliott's Debates,* Vol. III, p. 40.

> "Nothing is clearer", said Sumner, in the Massachusetts debates, "than that the existence of the legislatures in the different states is essential to the *very being* of the general government."
>
> *Elliott's Debates,* Vol. II, p. 64.

Wilson said:

> "Unless there be legislatures to appoint electors, the President cannot be chosen: the idea, therefore, of the existing government of the states, is presupposed in the very mode of constituting the legislative and the executive departments of the general government. * * *
>
> "I have already shown that the President and Senate cannot exist without the existence of the state legislatures. Have I misstated anything? Is not the evidence indisputable, that the state governments will be preserved or that the general government * * * must tumble amidst their ruins?
>
> "The legislative department is subdivided into two branches—the House of Representatives and the Senate. Can there be a House of Representatives in the general government, after the state governments are annihilated? Care is taken to express the character of the electors in such a manner, that even the popular branch of the general government cannot exist unless the governments of the states continue in existence."
>
> *Elliott's Debates,* Vol. II, pp. 439, 438.

Luther Martin, in one of the debates on the necessity of the two branches in the Federal Legislature, expressed the view

> "* * * that the people of the states, having already vested their powers in their respective legislatures, could not resume them without dissolution of their governments."
>
> *Elliott's Debates,* Vol. V, p. 218.

Madison said that in the proposed plan of government the Legislatures of the States were an essential feature. He pointed out the difficulty of electing to the Legislature of a great republic, representatives who will at once be the representatives of the local interest of all those who choose them, and still be fit to comprehend and pursue great and national objects.

> "The Federal Constitution forms a happy combination in this respect; the great and aggregate interest being referred to the national, the local and particular to the State legislatures."
>
> *Federalist* No. 10, *Ham. Wks.* XI, p. 76.

Hamilton, speaking in New York of the State Governments and their relation to the Federal Government, said:

> "The blow aimed at the members must give a fatal wound to the head."
>
> *Elliott's Debates,* Vol. II, p. 353.

And Madison, in No. 45 of the *Federalist, Ham. Wks.,* Vol. XI, p. 382, expressed himself as follows:

> "The state governments may be regarded as constituent and essential parts of the federal government; while the latter is in no wise essential to the

> operation or organization of the former; without the intervention of the state legislatures, the President of the United States cannot be elected at all. * * * The Senate will be elected absolutely and exclusively by the state legislatures."

And in his luminous style he demonstrates the dependence of the federal upon the State organization.

As was pointed out in *People v. Sours,* 31 Colo. 369, 74 Pac. 167:

> "Under the constitution of the United States, the state governments must be preserved throughout the entire state."

No part of the State Governments is so closely interwoven with the Federal Constitution as are the Legislatures. And we contend that the attempted assumption by the people of the powers of their Legislatures would *pro tanto* violate our national scheme of government and our Federal Constitution.

2.

THE DIVISION OF POWERS OF THE THREE DEPARTMENTS IN EACH OF THE STATES IS A PREREQUISITE TO THE NATIONAL GOVERNMENT.

The qualifications requisite for electors of the most numerous branch of the State *Legislature* determine the qualifications for electors of the national House of Representatives. (*U. S. Const.,* Art. I, Sec. 2.)

The *Legislatures* of the States shall choose the Senators of the United States. (Art. I, Sec. 3.)

The *Legislatures* shall prescribe the times, places and manner of holding elections for Senators and Representatives. (Art. I, Sec. 4.)

The acquisition by the National Government of places for the erection of forts, magazines, arsenals, dockyards and other needful buildings, shall be by purchase from the States with the consent of the *Legislature*. (Art. I, Sec. 8, Clause 17.)

In the election of the Chief Executive of the nation, electors shall be appointed in such manner as the *Legislatures* of the States may direct. (Art. II, Sec. 1, Clause 2.)

In the creation of the States, by the junction of two or more States, or parts of States, the national Legislature shall act with the consent of the *Legislatures* of the States concerned. (Art. IV, Sec. 3.)

In cases of domestic violence within a State, the President shall intervene on application of the *Legislature* of the State. (Art. IV, Sec. 4.)

The power of proposing amendments to the Constitution rests in Congress, or in the *Legislatures* of two-thirds of the States, with ratification by the *Legislatures* of three-fourths of the States, if that mode of ratification is proposed by Congress. (Art. V.)

The members of the *Legislatures* of the States shall be bound by oath or affirmation to support the Constitution and laws of the United States. (Art. VI.)

The Constitution further assumes that each State will maintain an *executive* (Art. I, Sec. 3; Art. IV, Sec. 4), and a *judiciary.* (Art. VI.)

Thus the Constitution assumes the existence in each State of a purely republican form of government, with its powers exercised by the three departments, the continuance of which in the States was, as has been shown, relied upon by the framers of the Constitution.

Minor v. Happersett, supra.

And of this arrangement, Mr. Justice Harlan, in *Taylor v. Beckham,* 178 U. S. 609, said:

> "The cornerstone of our republican institutions is the principle that the powers of government shall, in all vital particulars, be distributed among three separate coordinate departments, legislative, executive and judicial."

In *Kilbourn v. Thompson,* 103 U. S. 168, the following language was used by Mr. Justice Miller:

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether state or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined."

See *Ex parte Virginia, supra.*

And in *Rice v. Foster (supra)* it was said:

> "The sovereign power, therefore, of this State, resides with the legislative, executive and judicial

departments. Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it. To do so would be an infraction of the constitution and a dissolution of the government."

James Iredell, later a Justice of this Court, said:

"The best writers and all the most enlightened part of mankind agree that it is essential to the preservation of liberty that such distinction and separation of powers should be made."

Elliott's Debates, Vol. IV, p. 73.

Monroe in *"The People the Sovereigns"*, at pp. 200-203, discusses the result of uniting government with the sovereign power. "When the government is united with " the sovereignty there can be no checks whatever on " the government." He goes on to say:

"When these two powers are united in the people there can be no regular division of power into three branches distinct and independent of each other. The whole will be in one body, that is, in the General Assembly of the People, who will control every measure of every department. Thus all the powers of government, legislative, executive and judicial, will be concentrated in the same body, a concentration which all political writers agree is despotic, and which experience has shown is not less so when united in the people, by the abuses inseparable from it than in one individual, and for a reason which must strike the common sense of all mankind, that in the latter instance the individual when his acts are oppressive will have the whole people against him; whereas in the other the majority will stand together and support each other."

Indeed, as has been frequently pointed out, if the people may reserve to themselves the exercise of the power of legislation, so they may the executive and judicial powers. What would result?

> "Are we not taught by reason", said Randolph, "experience and governmental history, that tyranny is the natural and certain consequence of uniting these two powers or the legislative and judicial powers exclusively in the same body? * * * Whenever any two of these three powers are vested in one single body they must at one time or other terminate in the destruction of liberty."
>
> Randolph—*Elliott's Debates,* Vol. III, p. 83.

3.

IT IS EVIDENT THAT UNDER THE CONSTITUTION THE STATE LEGISLATURES ARE THE AGENCY TO CARRY ON THE RELATIONS BETWEEN THE NATION AND THE STATES.

Thus the right to vote for State legislators is the test of the right to vote for congressmen. (*Const.*, Art. I, Sec. 2.)

That test the Oregon amendment destroys.

It cannot be said that the constitutional requirement is met, where the members of the State Legislature for whom the electors vote are such only in name, where the functions which the word "Legislature" implies—authority and power to make the laws—have been placed in the hands of the people. The purpose of the framers of the Constitution is manifest. Those who were entrusted with the ballot in the selection of members of State legislative assemblies were to take part in the composition of the national Legislature.

On what theory could electors, unable to choose satisfactory representatives for legislation in State affairs, elect the members of the national House of Representatives?

It was several times pointed out during the debates on the adoption of the Constitution that the national suffrage depended upon the election of State Legislatures.

Davie said:

> "Who are to vote for the federal representatives? Those who vote for the state representatives. If the state government vanishes, the general government must vanish also. This is the foundation on which this government was raised, and without which it cannot possibly exist. * * * "
>
> *Elliott's Debates,* Vol. IV, p. 58.

General Brooks, in the Massachusetts Convention, said:

> "In the second place, it is impossible the general government can exist, unless the governments of the several states are forever existing; as the qualifications of the electors of the federal representatives are to be the same as those of the electors of the most numerous branch of the state legislatures."
>
> *Elliott's Debates,* Vol. II, p. 100.

Wilson argued that the national right of suffrage is the fundamental right of the citizen in a republic, resting under the Constitution upon the exercise of the right of suffrage in the election of State Legislatures. He said:

"In this system, it is declared that the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature. This being made the criterion of the right of suffrage, it is consequently secured, because the same Constitution guarantees to every state in the Union a republican form of government. The right of suffrage is fundamental to republics."

Elliott's Debates, Vol. II, p. 482.

Section 3, Article I, of the Constitution, provides that the Senate of the United States shall be composed of senators from each State, chosen by the Legislature thereof, for six years.

It is, of course, beyond question that the people of a State cannot, under the Federal Constitution, by direct vote elect the national Senators. As shown below, the term "Legislature" in the Constitution means an *assembly of representatives*. Were it otherwise, the voters of Oregon, as a part of its Legislature, would be necessary agents in the election of the Senators of that State—illustrating the incongruities which would arise from the introduction into our Government of the principle of direct legislation by the people.

If the initiative amendment to the Constitution of Oregon is valid, there is in Oregon no Legislature, no assembly vested with the *power* of making laws, no *body* authorized to elect the national Senators. The Legislative Assembly cannot elect them because it is not the Legislature or law-making power of the State; the people cannot elect them, for they are not an assembly of legislators.

It has been declared by the Supreme Court of Oregon that under the initiative "there remains, as formerly, but one legislative department of the State". "And", says the Court,

> "by the adoption of the initiative and referendum into our constitution, the legislative department of the State is divided into *two separate and distinct law making bodies.*" (Italics ours.)
>
> *Straw v. Harris,* 54 Ore. 424; 103 Pac. 777.

Which of these bodies is the Legislature?

Is it claimed that the Legislative Assembly of the State of Oregon continues to be its Legislature in everything but in the power of making laws?

Are those whom the people of the State themselves select, but will not trust with the administration of government and the enactment of laws, competent to choose the Senate of the United States? It is submitted that such an arrangement is an evasion of the provision of the Constitution of the United States regarding the election of Senators and in this connection we observe that the powers "reserved to the people" by the amendment to the Constitution of Oregon extend to every act of every nature; at their will the Legislative Assembly of the State becomes an empty form.

We are aware that in Oregon the people now undertake at the polls to dictate the appointment of United States Senators. It may, therefore, be answered that in effect the Legislature of Oregon does not today choose the senatorial representatives of the State. But the constitutionality of direct legislation cannot of course, be supported by reliance on a practical violation of the

Constitution in another particular. Under the Constitution the Legislature must elect the Senators, and the Legislature may not, therefore, be eliminated from the State.

In Section 8 of Article I of the Federal Constitution is found the provision that Congress may, with the consent of the "Legislature" of the State, purchase places within the State to be used for forts, arsenals, *etc.* It has been held that a constitutional convention cannot agree to such a purchase, for it is not a "Legislature". (*Op. Atty.-General,* XII, 428.) Who, under the Oregon amendment, is it that now gives that consent? The people? They are not its Legislative Assembly or Legislature. The Legislative Assembly? It is not the law-making power or Legislature.

Section 4 of Article I of the Federal Constitution empowers the State Legislatures to prescribe the times and places and manner of holding elections for Senators and Representatives in the Congress of the United States. Section 1 of Article II gives to the Legislature the power of directing the manner in which the States shall appoint electors for the election of the President and Vice-President of the United States.

In *McPherson v. Blacker,* 146 U. S. 1, the power of the Legislature of the State of Michigan to provide for the appointment of electors by congressional districts within the State was under consideration. The Court, speaking of these provisions of the Federal Constitution, said:

> "The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object."

Section 3 of Article IV makes the junction of States dependent upon the will of the State Legislature.

Section 4 of Article IV empowers the State Legislature to apply for Federal protection against domestic violence.

Which of the "two separate and distinct law making bodies" of the "legislative department of the State of Oregon" will exercise the functions conferred by these provisions upon State Legislatures? Will it be the Assembly? Or if the people choose to make all the laws for the State, will it be the latter?

What, if the Legislature of the State had no practical existence, would become of the power to invoke Federal aid to protect the State against domestic violence? As already said, if the people may legislate, they can also exercise the powers of the executive. Hapless would be the minority in a State where the right to appeal to the national Government for protection against a rioting mob lay in the hands of the rioters! Is it not against the force of numbers that the Federal Government under the Constitution agrees to preserve the lives, liberty and property of the citi-

zens of each State? The cases above all others in which the Legislature or Executive of a State would need to invoke Federal aid would be those in which that aid would be required to curb the violence of a lawless majority. During the disturbances in Nevada the mine owners of that State would have had but little hope for the protection of the Federal troops if their presence awaited a call from the majority of the people of that State. Yet, if the proponents of initiative legislation be consistent, they will concede that no function of government is higher than the power to make the law, and that if constitutionally this power may be placed in the hands of the people, so may every other part of the government.

It must be borne in mind that under the Oregon amendment the people may propose and enact any law, and may "reject at the polls any act of the Legislative "Assembly".

The people are thereby vested with authority to nullify all acts of the Legislative Assembly, including those passed in the performance of its functions under the Federal Constitution.

Thus, the Legislature of the State might prescribe that elections for representatives should be held in November; the people might enact that no elections should be held in that month. The Legislature might provide for the use of the Australian ballot in the elections of representatives to Congress; the people by initiative law could prohibit the use of the Australian ballot in any election in the State of Oregon. The Legislative As-

sembly of the State might consent to the purchase by the United States Government of State lands for the use of a military reservation; the people by initiative law might reserve the same land for a public park.

In other words, the people, if they chose, could exercise their powers in direct hostility to the enactments of the Legislative Assembly. A harmonious system of legislation, not only in those affairs which affect the nation, but in matters of State interest as well, would depend on the whims of the people and on the motives of those leaders who would soon learn to frame and control initiative petitions and to wield the vote, or the greater part of the vote, of the State.

The powers conferred by the Federal Constitution upon the State Legislatures are attributes of the sovereign law-making power of the States. They illustrate the dependence of the national Government upon the structure of the State Governments. But these functions which, under the Federal Constitution, are to be exercised by the State Legislatures, are but adjuncts to their normal powers. To deprive Legislative assemblies of the law-making powers and to maintain them for the purpose of exercising the powers reposed in the State Legislatures by the national Constitution, would be a subterfuge, an ostensible adherence to the letter of the Constitution, but a plain violation of its spirit and purpose.

The Oregon amendment would undermine and overthrow the one feature of State government upon which,

more than any other, rests the national structure—the State Legislature.

4.

THE WORD "LEGISLATURE" IN THE CONSTITUTION MEANS A REPRESENTATIVE ASSEMBLY CONSISTING OF TWO HOUSES, EMPOWERED TO MAKE THE LAW. SUCH WAS ITS MEANING AT THE TIME OF THE ADOPTION OF THE CONSTITUTION.

The Constitution requires of each State the maintenance of a Legislature which, first, shall exercise certain functions; which, second, shall be a legislative assembly supreme within the sphere of its delegated powers, and which, third, shall consist of at least two houses.

The Constitution itself furnishes the meaning of the word "legislature". Thus Article VI of the Federal Constitution provides that the *members of the several State Legislatures* shall take an oath to support the Constitution of the United States and the laws thereof.

It is manifest from this provision that the framers of the Federal Constitution understood the word "legislature" to mean an *assembly* making the laws.

Pursuant to Article VI of the Constitution Congress, by the Act of June 1, 1879 (Stat. at Large, Vol. I, p. 23, Section Three thereof) required the members of the several State Legislatures to take the oath prescribed by Section One of the Act before proceeding to their duties.

Under the initiative amendment this clause of the Constitution and the provisions of the Act of 1789 would

have little meaning. There would be in effect an assembly styled a legislature taking the oath, and a body of voters making the laws.

Furthermore, the meaning of the word "legislature" as used in the Constitution, was well defined at the time the Constitution took effect.

Words and terms are to be taken in the sense in which they were used when the Constitution was adopted.

Veazie Bank v. Fenno, 8 Wall. 542;
Locke v. New Orleans, 4 Wall. 172;
U. S. v. Harris, Abb. U. S. 110;
U. S. v. Block, 4 Saw. 211.

Constitutional provisions are to be expounded in the light of conditions existing at the time of their adoption in connection with former provisions and historical facts relating to the origin of our political institutions and the practice under them.

Fox v. McDonald, 101 Ala. 51.

The States all had their representative legislative bodies at the time of the adoption of the Constitution.

> "In all of the states the form of government was that of republic with the supreme legislative power vested in a representative assembly."
>
> *Bancroft Hist. of U. S.*, IX, 260 *et seq.*

And see *supra* paragraph IV, sub. 5.

In the *Century Dictionary* a legislature is defined as:

> "A body of law-makers, an assemblage of men vested with the power of making, repealing or

changing the laws of a country or state, and of raising and appropriating its revenues. Any body of persons authorized to make laws or rules for the community represented by them."

Prof. March defines a Legislature as:

"*The body* of men in a state having the power to enact or repeal laws." (Italics ours.)

Thesauraus, p. 589.

In *Evansville v. The State,* 118 Ind. 426, 441, the Court, in discussing the meaning of the terms "legislative" and "legislature", said:

"The word 'legislative' is defined by Worcester as follows: 'That which makes or enacts laws; lawmaking; legislative power; of or pertaining to legislation or to a legislature, as, legislative proceedings.' 'Legislative' is defined by Zell as follows: 'Making, giving, or enacting laws; relating or pertaining to the passing of laws'. Webster defines 'legislative' as follows: 'Giving or enacting laws, as, a legislative body; pertaining to the enacting of laws; suitable to laws, as, the legislative style; done by enacting, as, a legislative act'. Wharton, in his Lexicon, defines 'legislation' as follows: 'The act of giving or enacting laws'. 'Legislature': 'The power to make laws'. Abbott, in his Law Dictionary, under the head of 'Legislate', has the following 'To make laws. "Legislature": The body of persons in the state clothed with authority to make laws'. 'Legislative power': 'That one of the three great departments into which the powers of government are distributed—legislative, executive, and judicial—which is concerned with enacting or establishing, and, incidentally, with repealing, laws'."

5.

CONTEMPORANEOUS LEGISLATION BY CONGRESS SHEDS SOME LIGHT ON THE MEANING OF THE TERM "LEGISLATURE" AS USED IN THE CONSTITUTION.

It is provided in Article IV, Section 1, of the Constitution, that:

> "Full faith and credit shall be given in each state to the *public acts,* records and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The original draft of Article IV, Section 1, read

> "Full faith shall be given in each state to the acts of *the legislature* * * * of every other state."
>
> *Elliott's Debates,* Vol. V, p. 132.

The Committee on Detail so reported the resolution,

Eiliott's Debates, Vol. V, p. 381.

On consideration of the report the clause was referred to a committee which changed the language to conform to that of the corresponding provision in the Articles of Confederation.

Ib., Vol. V, pp. 488, 504.

In the Articles of Confederation the provision read:

> "Full faith shall be given in each of these states to the records, *acts* * * * of every other state."
>
> *Elliott's Debates,* Art. IV, Vol. I, p. 80.

And so the clause remained.

Thereupon, Congress, in 1790, enacted a statute that

> "The *acts of the legislature* of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory or country affixed thereto."
>
> *Stat. at Large,* May 26, 1790, vol. I, p. 122.

It is apparent that the change made in the original draft of the provision was interpreted by Congress to be in the style, rather than in the meaning, and that the *public acts of the State,* so far as these were legislative, were conceived to be the *acts of its Legislature.*

Under the Statute of 1790 the acts of the Legislature of the State of Oregon are given full faith and credit throughout the United States. If the Legislative Assembly of that State can still be said to be its Legislature, its enactments will be received as the law of Oregon in the sister States of the Union; but, the statutes initiated and enacted by the people, being the acts of no legislature, are entitled to no recognition beyond the limits of the State of Oregon.

So that the enactments of one "branch of the legislative department" of the State of Oregon will be recognized as the law of the State of Oregon in other States of the Union; whereas such recognition cannot be enforced for the enactments of the "coordinate legislative body", the other branch of the legislative department of the State.

Plainly, such a condition of affairs would introduce a strange discord into our polity, and exemplifies again

the repugnance of the initiative to the conditions of our Government.

6.

THE INITIATIVE DESTROYS THE LEGISLATIVE ASSEMBLIES OR LEGISLATURES WHICH IT IS THE IMPLIED OBLIGATION OF EACH STATE TO MAINTAIN, FOR A LEGISLATURE MUST BE THE LAW-MAKING POWER.

Unless supreme within its jurisdiction a legislative assembly is not a Legislature.

Blackstone said:

> "It is of the very essence of a law that it is made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other."
>
> *Com.*, Vol. I, p. 46.

> "There is", says *Dicey*, "a logical and practical impossibility of combining absolute legislative authority with restrictions on that authority which would make it cease to be absolute."
>
> *Law of the Const.*, p. 66.

> "The essence of legislative authority", said Hamilton, "is to enact laws."
>
> *Federalist*, No. 75.

> "What is legislation but a form of making the laws?"
>
> *Federalist*, No. 33.

Under the Oregon amendment the people have equal powers of legislation in general matters with the legislative assembly of the State. The latter then ceases to be the law-making power, or Legislature.

Two co-ordinate legislative authorities, each with equal power of making, repealing and amending laws, would be political anarchy and chaos. This was pointed out in *Ex parte Anderson*, 134 Cal. 73, where the Court said:

> "It is too plain to admit of argument, that, under our system of government, there never can be two equal, co-ordinate law-making powers, each existing without any restrictions the one upon the other. Yet such is the precise case presented and apparent from an inspection of the sections of the constitution and of the County Government Act above quoted. Upon the one hand, there is conferred upon the board of supervisors, as has been the universal rule, full power to make all laws pertaining to the government of the county. Upon the other hand, this identical power is bestowed by the machinery of the ballot upon the voters of the county. When an ordinance is thus passed by ballot, it has no superior force, but has merely 'the same and equal force and effect as though adopted and ordained by the board of supervisors'. The right of the supervisors to repeal such ordinances is not taken away, and it is within their power to repeal them one after the other as soon as they shall have been adopted. Upon the other hand, it is equally the right of the people to re-enact them after such repeal. It is the old problem of the irresistible force meeting the indestructible barrier. So far as legislation is concerned, nothing could result but untold confusion. As the two sets of laws, thus creating co-ordinate law-making powers, without check, limitation, or restraint, the one upon the other, cannot, in the nature of our government, exist, it follows that one or the other of the provisions is invalid and must fall." Henshaw, J.

That the power of direct legislation by the people leads logically to the elimination of the State Legisla-

tures as the law-making power is stated in *People v. Collins (supra)* 3 Mich., at p. 368. Speaking of the referendum, the Court used these words:

> "In view of such a state of things, what is to be the final result and end of this kind of legislation? Our boasted system of representative government is to be perverted, and a *collective democracy*, the most uncertain and dangerous of all governments, to be arbitrarily substituted in its stead. Such must be the inevitable result and end of such legislation; for if the legislature can take this step, and pass one law in this way, it can, beyond all controversy, pass every other law in the same way. The legislative department of the government, therefore, instead of being the law-making power, under the Constitution, becomes a self-constituted body, merely to frame bills for the electors of the state, *collectively* to pass or reject, by a vote at the elections, and as they may from the spur of the moment, or without much thought or reflection, deem proper."

And in *Rice v. Foster (supra)* the Court said of the referendum:

> "The General Assembly will become a body merely to digest and prepare legislative propositions; and their journals a register of bills to be submitted to the people for their enactment. Finally, the people themselves will be overwhelmed by the very evils and dangers against which the founders of our government so anxiously intended to protect them; all the barriers so carefully erected by the Constitution around civil liberty, to guard it against legislative encroachments, and against the assaults of vindictive, arbitrary and excited majorities, will be thrown down; and a pure democracy, 'the worst of all political evils' will hold its sway under the hollow and lifeless form of a republican government." (4 Harr. 499.)

It is not contended that the Legislature of a State must be vested with the supreme power of government. It is conceded that the people of a State may, by popular vote, make the fundamental law. Such has been the uniform practice in our country. The extent of the statute-making power, the field of its jurisdiction, may, under our form of government, be enlarged or diminished by the constituent law-making power—the people. But it is maintained that within its sphere a Legislature must be supreme, or it ceases to be such.

> "Limited sovereignty * * * ", says Dicey, "is a contradiction in terms."
>
> *Law of Const.*, p. 66.

It is true that in our Government all sovereign power is in the people. More accurately speaking, it is in that body which, under our Federal Constitution, can amend that instrument. But this is a political and not a legal fact. No law would be declared unconstitutional by our courts, because opposed to the will of a majority of the voters.

It has been observed by Burke and other writers, that a representative legislative Government as well as a pure democracy must, in the last instance, reflect the will of the majority of the governed. To sustain the theory of supremacy of the Legislature in our system of government it is not necessary to deny that the sovereign power reposes with the majority. Even the sovereignty of the Parliament of the United Kingdom of Great Britain and Ireland must be, as it actually is, exercised in accordance with the will of its subjects.

In elective representative governments divergencies between the Legislature and the people are eliminated by the ballot. But, to forestall such differences, or to eradicate them by the substitution of a higher legislative authority, to wit: the people *en masse,* is to deprive the minority of a voice and of its right to be heard in accordance with the forms of republican government, and is the destruction of representation in government.

In *Ex parte Farnsworth,* 135 S. W. 535, it was said:

> "laws must be enacted by the legislature. This doctrine also flows from the very framework of our form of government. It is the basic principle and theory of republican form of government as set out in the Constitution."

In *Baltimore v. State,* 15 Md. 376, the Court expressed this idea as follows:

> "According to the theory on which our State Government is founded, the people are recognized as the source of all governmental power. They are, in this sense, the true and only sovereigns. For their own good, they have authorized a body, chosen by themselves, to exercise, under certain prescribed limitations, the supreme power. This body is known, in common parlance, as the legislature, and, except in cases prohibited either by the Constitution of the United States, or that of the State, is as free and competent to act in the passage of binding and effective laws as would be the people themselves, if they were acting in their primary and sovereign capacity as a pure democracy, restrained only by their sense of justice and expediency."

It is asserted by proponents of the initiative that by giving to the Legislative Assembly the power to repeal any initiative measure passed by the people, the republican form of government is preserved.

This suggestion was made by the Supreme Court of Oregon in the case of *Kadderly v. Portland,* 74 Pac. 710; 44 Or. 118. It was there said:

> "No particular style of government is designated in the Constitution as republican, nor is its exact form in any way prescribed. A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority."

The Court further finds that:

> "Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the legislature and Governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the legislature at will." *

Such a "system" of government does not, we submit, meet the Court's definition of a "republican form". Not only have the people the veto power on the acts of the Legislature, but it is not to be believed that a

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* The decision in the Kadderly case was written before the adoption of the amendment of 1910 providing that tax measures should not be subject to the restrictions of the state constitution. (See supra, par. I.)

Legislature holding office from the people would repeal the enactments of its electors.

The Oregon amendment therefore eliminates the principle of representation from the highest function of government—legislation.

In Oklahoma, the framers of the proposed Constitution frankly admitted that the provision giving the Legislature "power to repeal initiative laws" was inserted with the expectation that no Legislature would ever exercise such power—illustrating the extent to which proponents of the initiative expect the legislative power of the Assembly to be actually destroyed by the provisions for direct legislation.

And in Oregon no bill regulating taxation can become a law until approved by the people at a general election (*supra,* par. I).

As said before, in practice an elective representative Legislature must in the last resort enact legislation in accordance with the will of the people. But this is far different from the enactment by the people of legislation which the Legislature will not dare to repeal. In the one case the voice of the people is molded by and expressed by the people's representatives; in the latter case the representatives become figure-heads—impotent to assist or moderate or guide the expression of the popular will.

To paraphrase a famous paragraph from the writings of Sir Henry Maine: The British Parliament legislates and rules—Congress legislates, but does not rule—.

It would remain for the Legislative Assembly of Oregon neither to legislate nor to rule.

7.

THE INITIATIVE OVERTHROWS ONE OF THE GREATEST SAFEGUARDS AGAINST THE ABUSE OF THE POWER OF LEGISLATION, TO WIT: THE SYSTEM OF A DUAL LEGISLATIVE ASSEMBLY.

The provision in the Federal Constitution, Article I, Section 2, prescribing the qualifications for electors of the National House of Representatives implies the existence in each State of at least two houses for the enactment of legislation. Thus the "electors in each "state" of "the members of the House of Represen- "tatives" shall have the qualifications requisite for the *most numerous branch* of the State Legislature. The bicameral system engrafted on the National Government is part of the form of our State Government. It was in operation in all the States of the Union but one.

Elliott's Debates, Vol. V, p. 217.

In the debates on the advisability of having the Congress consist of two houses, even those who favored a single chamber for the National Legislature admitted the necessity of the dual assembly in State Legislatures. Thus, Sherman, who argued for a single national council

> "admitted two branches to be necessary in the state legislatures".

Elliott's Debates, Vol. V, p. 218.

"Wilson urged the necessity of two branches; observed that if a proper model was not to be found in other confederacies it was not to be wondered at."

Ib., Vol. V, p. 219.

And see

Elliott's Debates, Vol. II, p. 198.

Mason is thus reported:

"He believed the mind of the people of America as elsewhere was unsettled as to some points but settled as to others. In two points he was sure it was well settled—first, in attachment to republican government; secondly, in an attachment to more than one branch in the legislature."

Ib., Vol. V, p. 216.

"The necessity of a Senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions * * *"

Federalist No. 63, *XII Hamilton's Works*, p. 129.

James Iredell, in the South Carolina Convention, said:

"I believe, sir, it was the general sense of all America, with the exception only of one state, in forming their own state constitutions, that the legislative body should be divided into two branches, in order that the people might have a double security. It will often happen that, in a single body, a bare majority will carry exceptionable and pernicious measures. The violent faction of a party may often form such a majority in a single body, and by that means the particular views or interests of a part of the community may be consulted, and those of the rest neglected or injured. Is there a single gentleman in this convention, who

has been a member of the legislature, who has not found the minority in the most important questions to be often right? Is there a man here, who has been in either house, who has not at some times found the most solid advantages from the cooperation or opposition of the other? If a measure be right which has been approved of by one branch, the other will probably confirm it; if it be wrong, it is fortunate that there is another branch to oppose or amend it."

Elliott's Debates, Vol. IV, p. 38.

Hamilton, speaking in the New York Convention, said:

"From these principles it follows that there ought to be two distinct bodies in our government—one which shall be immediately constituted by and peculiarly represent the people, and possess all the popular features; another formed upon the principle and for the purposes before explained. Such considerations as these induced the convention who formed your state constitution to institute a senate upon the present plan. The history of ancient and modern republics had taught them that many of the evils which these republics suffered arose from the want of a certain balance and mutual control indispensable to a wise administration; they were convinced that popular assemblies were frequently misguided by ignorance, by sudden impulses, and the intrigues of ambitious men, and that some firm barrier against these operations was necessary; they, therefore, instituted your senate, and the benefits we have experienced have fully justified their conceptions."

Elliott's Debates, Vol. II, p. 302.

That the power of direct legislation, when vested in the people, deprives the State of the protection of a dual

legislative chamber, was forcibly expressed in *People v. Parker,* 6 Barr. 507. The Court said:

> "For an Assembly of two branches designed to hold each other in check, the smaller body being composed of members of an age greater than that required to give the right of suffrage, and the proceedings of both subject to the veto of an executive officer of still more matured years than the senator, will be substituted a mass of votes of every variety of mental capacity and training, many of whom may have barely attained the legal age of twenty-one years, from whose decision no appeal lies but to themselves, and whose action is subject to no veto." (p. 519.)

The advantages of the two-chamber system are shown by Story. It is a safeguard against undue, hasty and oppressive legislation; it lessens the danger from the efforts of demagogues; it leads to better consideration and a wiser character of the laws, and a greater stability in legislation.

> "A senate", says Story, "duly constituted, would not only operate as a salutary check upon the representatives, but occasionally upon the people themselves, against their own temporary delusions and errors. The cool, deliberate sense of the community ought in all governments, and actually will, in all free governments, ultimately prevail over the views of their rulers. But there are particular moments in public affairs when the people, stimulated by some irregular passion or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments how salutary will be the interference of a body of respectable citizens, chosen without reference to the

> exciting cause, to check the misguided career of public opinion, and to suspend the blow, until reason, justice and truth can regain their authority over the public mind. It was thought to add great weight to all these considerations that history has informed us of no long lived republic which has not a senate."
>
> *1 Story,* pp. 419, 420.

And see

Cooley, Const. Lim., p. 187.

It needs no argument to show that the necessity of a check upon a single body is twofold, when considered with reference to the mass of voters of the State as legislators. The dangers of initiative legislation have already been pointed out; the matter is here referred to, to show that direct legislation again violates a fundamental tenet of our Government—the provision for two houses of legislation.

VI.

THE PROVISION IN THE OREGON CONSTITUTION FOR DIRECT LEGISLATION VIOLATES THE PROVISIONS OF THE ACT OF CONGRESS ADMITTING OREGON TO THE UNION.

The preamble of the Act of Admission provides:

> "Whereas, the people of Oregon have formed, ratified and adopted a constitution of state government which is republican in form, and in conformity with the Constitution of the United States, and have applied for admission into the Union on an equal footing with other states; * * *"
>
> *Act of Congress,* Feb. 14, 1859.

At the time Oregon was admitted to the Union her Constitution was republican in form.

No law should take effect upon any authority except that provided in the Constitution, to wit: the Legislative Assembly. (Art. I, Sec. 21.)

The powers of government were divided into the three departments. (Art. III, Sec. 1.)

Legislative authority was vested in an assembly of representatives, the governor having a qualified veto. (Art. IV, Sec. 1, Art. V, Sec. 15.)

The preamble of the Act of Admission states the condition upon which the State of Oregon was admitted to the Union. It has been shown with sufficient particularity that this condition is violated by a government exercised directly by the people. But the terms of that condition are perpetual and unchangeable.

It was said in *Romine v. State,* 34 Pac. 925:

> "The Act of Congress which enables a territory to come into the Union as a State usually contains

> many provisions which, upon the admission of the state, become inviolable, either by the state or the United States."

In *People v. Adams,* 73 Pac. 866 (Colo.), the Court speaks of the

> "republican form of government which the state is obliged to maintain under its compact with the federal government as evidenced by the enabling act".

The State of Oregon was admitted because its proposed government was republican. The implied contract was that the State would continue that form. Every person within the State is entitled to that form of government. The State cannot secede from the Union. A change in its fundamental law, repugnant to republican institutions, is contrary to the Act of Congress admitting the State, and is an impairment of the obligation of the State to preserve a republican form of government.

Conclusion.

The question is submitted with confidence that this Court will protect the people in the enjoyment of those constitutional checks and safeguards against their own power which with wisdom and deliberation they created for themselves. Injustice and misrule have characterized all unconstitutional democracies and all popular governments administered in accordance with the whims and caprices of the multitude.

"Happy is that country," said a well known writer, "whose constitutional system enables it to enjoy the blessings of popular government, while at the same time it is protected from the evils of hasty and passionate legislation. And while, perhaps, the constitutional system of this country has not developed exactly in accordance with the wishes and expectations of Washington, Hamilton, Madison, and their co-workers, yet if it were possible for them to know the results actually achieved, they would be satisfied with the knowledge that they had in a measure succeeded in establishing, what exists nowhere else, a popular government without democratic absolutism."

Tiedeman, Unwritten Const. of the U. S., 164.

It is in the power of this Court to maintain and preserve this Government against the attack of direct legislation and the absolutism of numbers.

We close our argument with the words of Daniel Webster, who, in expressing the belief that not harm but good would come from a celebrated controversy then before this Court, said:

"It will purify the political atmosphere from some of its noxious mists, and I hope it will clear men's minds from unfounded notions and dangerous delusions. I hope it will bring them to look at the regularity, the order, with which we carry on what, if the word were not so much abused, I would call our *glorious* representative system of popular government. Its principles will stand the test of this crisis, as they have stood the test and torture of others. They are exposed always, and they always will be exposed, to dangers. There are dangers from the extremes of too much and of too little popular liberty; from monarchy, or military des-

potism, on one side, and from licentiousness and anarchy on the other. This always will be the case."

And continuing, he concluded:

"The prudence of the country, the sober wisdom of the people, has thus far enabled us to carry this Constitution, and all our constitutions, through the perils which have surrounded them, without running upon the rocks on one side, or being swallowed up in the eddying whirlpools of the other. And I fervently hope that this signal happiness and good fortune will continue, and that our children after us will exercise a similar prudence, and wisdom, and justice; and that, under the Divine blessing, our system of free government may continue to go on, with equal prosperity, to the end of time."

It is respectfully submitted that the judgment should be reversed.

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